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PREFACE

The *Military Law Review* is designed to provide a medium for those interested in the field of military law to share the product of their experience and research with their fellow lawyers. Articles should be of direct concern and import in this area of scholarship, and preference will be given to those articles having lasting value as reference material for the military lawyer.

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CAMPBELL SMITH
Judge Advocate of the Army
1797–1802

In 1784 the Army of the United States was reduced to less than one hundred officers and men and it was not until after the adoption of the Constitution in 1789 that any great interest was taken in military matters. Judge advocates were merely detailed from the line of the Army. In 1792 the Army was organized into the Legion of the United States and on 16 July 1794, pursuant to an order of Major General Anthony Wayne, Lieutenant Campbell Smith, IV Sublegion, who had entered the service as an ensign of Infantry in March 1792, was appointed "Judge Marshal and Advocate General to the Legion of the United States." He served more than two years as Judge Advocate and also performed the additional duties of aide-de-camp to Brigadier General Wilkinson. He relinquished his office of Judge Marshal and Advocate General on 13 July 1796. On 1 November 1796 the Army was reorganized and he became a lieutenant in the Fourth Infantry. As a result of the fact that special emoluments for his office were not provided by law, he applied for Congressional redress in 1798 for services rendered as a judge advocate from 1794 to 1796. Acting on his position, Alexander Hamilton, as Deputy to General Washington who had returned from retirement to head military preparations for a possible war with France, writing from New York on 25 October 1799 pertinently stated :

I consider it to be a principle sanctioned by usage that when an officer is called to exercise in a permanent way an office of skill in the Army (such as that of Judge Advocate) for which provision is not made by law, he is to receive a *quantum meruit* by special discretion for *the time he officiates*, which in our present system would be paid out of the funds for the contingencies of the War Department.

Favorable action was taken on his petition and he received the equivalent of pay of The Judge Advocate of the Army as provided in the Act of 3 March 1797 (1 Stat. 507) for services rendered from 1794 to 1796. (Report of Committee of Claims, 21 February 1800, United States House of Representatives.)

This same act, which had been passed by the Congress to prepare the Army for a threatened war with France, provided :

That there shall be one Judge Advocate, who shall be taken from the commissioned officers of the line, and shall be entitled to receive two rations extra per day, and twenty five dollars per month in addition to his pay in the line; and whatever forage shall not be furnished by the public, to ten dollars per month in lieu thereof.

Pursuant to this act, on **2 June 1797**, Campbell Smith, then a Lieutenant in the 4th Infantry, was appointed Judge Advocate of the Army, with rank as a lieutenant of the line to continue. He was promoted to Captain in the Fourth Infantry while still serving as Judge Advocate of the Army on **20 November 1799**. It appears that he was relieved as captain of Fourth Infantry on **1 April 1801** and served thereafter exclusively as “Judge Advocate.” (*Compare 1Heitman, Historical Register and Dictionary of the United States Army 39 (1903), with id. at 895.*)

On **16 March 1802** Congress passed an act establishing the United States Military Academy, limiting the line of the Army to three regiments, and abolishing the Office of Judge Advocate of the Army (**2 Stat. 132**). Pursuant to this act, Captain Smith was discharged from the service on **1 June 1802**.

Subsequent to this date and during various parts of its history, the United States Army had Judge Advocates but it was not until **1849** that Congress again authorized a “Judge Advocate of the Army)’ (Act of **2 March 1849, 9 Stat. 341**).

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DEPARTMENT OF THE ARMY
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AN OFFICER'S OATH*

BY LIEUTENANT COLONEL THOMAS H. REESE**

I. INTRODUCTION

You have held personal safety and comfort above duty, honor, and country, and, in so doing, have deliberately violated your oath . . . as an officer of the United States Army.¹

These words of reprimand were imposed upon an Army lieutenant colonel by Lieutenant General Robert N. Young, then Commanding General, Sixth US Army, on 21 February 1956.

Considerable concern arose in the minds of military officers of the United States who read General Young's words. Questions of unsure loyalty, divided loyalty, and the meaning of an officer's oath were voiced by some commissioned officers. Others stated: "In many years of active service in the Armed Forces of the United States I have never been reminded, in training, of an officer's oath, nor heard a discussion of its meaning."

The words and thoughts are intriguing and indicate a crucial situation that exists in the officer corps of the Armed Forces of the United States. That is to say, there is not a general realization of the obligations entailed in the solemn oath of allegiance to support and defend the Constitution of the United States against all enemies and to bear true faith and allegiance to the same.

The framers of the Constitution professed concern for the nation and if we admit to ourselves that the Constitution is "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs"² we too must profess the same concern.

*This article was adapted from a thesis presented to the U. S. Army War College, Carlisle Barracks, Pennsylvania, while the author was a student there. A short adaptation of the thesis was published in the January 1964 issue of *Military Review*. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of the U. S. Army War College, the U. S. Army Command and General Staff College, The Judge Advocate General's School, or any other governmental agency.

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¹ Gen. Court-Martial Order No. 14, Hq. Sixth U. S. Army (21 Feb. 1956).

² *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

Let us take a view of an officer's oath, unhindered by the cynic and his doubts and with the hope that a look at the past will provide a partial guide for today and a pattern for the future.

Accordingly, it is the purpose of this study to endeavor to define the meaning and function of the military oath of office, to present for consideration the evolution of the statutory enactments, to point out some historic and current conflicts of unsure and divided loyalty to the Constitution, to indicate the problem of an officer's oath in an integrated international military command, and to put in proper perspective the preparation needed to educate commissioned officers regarding an officer's oath so that they may be prepared to say:

Where's the coward that would not dare to fight for such a land.³
instead of:

Dear friends, we, all prisoners, solidly appeal to you as follows: the armed intervention in Korean internal affairs is quite a barbaristic, aggressive action to protect the benefit of the capital monopolists of the U.S.A.⁴

II. OATH OF ALLEGIANCE—ITS MEANING AND FUNCTION

If a man . . . swear an oath to bind his soul with a bond; he shall not break his word, he shall do according to **all** that proceedeth out of his mouth.⁵

Webster's *Third New International Dictionary* states, in part, as follows:

Oath . . . a solemn . . . formal calling upon God or a god to witness to the truth of what one says or to witness to the fact that one sincerely intends to do what one says.

Mr. Justice Field, speaking for the Supreme Court of the United States, observed that :

By allegiance is meant the obligation of fidelity and obedience which the individual owes to the government under which he lives or to his sovereign in return for the protection he receives. It may be an absolute and permanent obligation, or it may be a qualified and temporary one. The citizen or subject owes an absolute and permanent allegiance to his government or sovereign, or at least until, by some open and distinct act,

³ Sir Walter Scott, *Marmion*, Canto IV, Stanza 30, as quoted in BARLETT, FAMILIAR QUOTATIONS, at 307 (11th ed., Morley ed. 1940).

⁴ KINKEAD, IN EVERY WAR BUT ONE 28 (1959). (The words quoted are attributed to an American officer 48 hours after his capture by the enemy in Korea.)

⁵ *Numbers* 30:2.

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he renounces and becomes a citizen or subject of another government or another sovereign.⁶

The origin of the oath of allegiance must be sought in feudal times. History reveals, to a considerable degree, that the oath as used today in legal institutions reached us through canon law, which in turn had three distinct yet intervening sources: preresligious culture, the law of the German tribes, and ancient Roman law.⁷ In each of these stages, however, the oath played a substantial part even from the earliest times; thus, we find Lycurgus saying to the Athenians: "An oath is the bond that keeps the state together,"⁸ and Baron de Montesquieu attributing the strength of the Romans to their respect for an oath in these words:

There is no nation, says Livy, that has been longer uncorrupted than the Romans;

Such was the influence of an oath among those people that nothing bound them more strongly to the laws. They often did more for the observance of an oath than they would ever have performed for the thirst of glory or for the love of their country.⁹

An oath is a pledge to perform an act faithfully and truthfully. The pledge is any form of attestation signifying that the one executing the oath is bound in conscience to perform faithfully and truthfully. The attestation involves the principle of invoking God to witness that which is announced as the truth, and implied is the invocation of His vengeance, or renunciation of favor, in the event of falsehood.

The ancient Scandinavians and Teutons swore by their gods and laid their hands on some object of veneration—a bloody ring held by the religious leader, their weapon, or their beard while subscribing to their oath. In ancient Rome, the military oath was between the commanding general and his troops. Initially, the legates and tribunes took the oath and then it was administered to the troops in the following manner: after one soldier from each legion had taken the complete oath, the remainder of the legion came forward one by one and said, "Idem in me." That is to say: "The same holds good for me." The oath was effective for only the current campaign and binding only as to the general on whose behalf it was executed—a new general, a new oath. This changed,

⁶ Carlisle v. United States, 83 U.S. (16 Wall.) 147 (1872).

⁷ Silving, *The Oath*, 68 YALE L. J. 1343 (1959).

⁸ "Oratio in Leocratem" as quoted by Chief Judge Vanderbilt in his opinion in Imbrie v. Marsh, 3 N.J. 578, 581, 71 A. 2d 352, 353 (1950).

⁹ MONTESQUIEU, L'ESPRIT DES LOIS, Bk VIII, ch. 14, at 55 (Nugent transl. 1949). (Quoted differently in Judge Vanderbilt's opinion in Imbrie v. Marsh, *supra* note 8.)

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however, in about 100 B.C. when Marius introduced military service for a term of 20 years. Thereafter, the entire command was required to take the oath all at the same time and for the complete period of service in the name of the state, or the emperor. After the advent of Christianity, it was preferred that the oath be taken in holy places—particularly near the altar whereupon had been placed holy relics.¹⁰

Warriors and liegemen, facing battle, were pledged to remain true to king or cause, even if captured. Treason brought retributive justice. The mark of Judas was upon that person who broke a trust or delivered a friend to the enemy. The code of the fighter was limited to knightly concepts of duty, honor, country, loyalty, honesty, trustfulness, courage, and bravery. Military knighthood in the days of chivalry was subject to much form. Manly arms were never received without the pomp and ceremony of investiture and many of the orders had their own oaths.

It developed that the Jew when taking an oath desired to be sworn on the Pentateuch or Old Testament, with his head covered; a Mohammedan, on the Koran; or a Chinese by the burning of joss-stick."

Of course, none of these formalities are essential to the taking of an oath as long as the form used meets the requirement of appealing to the conscience of that individual to whom the oath is administered. He must possess a realization to speak the truth.

The purpose of the oath, here being considered, is to express the solemnity of the occasion and to recognize and reveal devotion to the government. The oath is the tie that binds the individual to the government, in return for the protection received.

This being so, from what source came the military oath of office taken by an officer of the Armed Forces of the United States?

¹⁰ *Oath, Military*, 20 *ENCYCLOPEDIA AMERICANA* 584 (1958); 20 *ENCYCLOPEDIA AMERICANA* 532 (1952). (An interesting story is told in the latter reference regarding William the Conqueror and his prisoner, Harold. William, prior to making Harold swear to be a supporter in William's desire to ascend the throne of England, secretly deposited some relics of the most revered martyrs under the altar where the ceremony would take place. After the oath swearing had been accomplished, Harold was enjoined to remember his obligation of fidelity and obedience which he had taken upon himself under the auspices of religious sanction.)

¹¹ See, e.g., *State v. Chyo Chiagk*, 92 Mo. 395, 411, 4 S.W. 704, 709 (1887).

111. STATUTORY ENACTMENTS

Article VI, Clause 3, of the *Constitution of the United States* provides in pertinent part as follows :

... all executive. . . officers . . . of the United States . . . shall be bound, by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

The Constitution of 1787 did not provide the form of the oath. This was left for the First Congress to complete.

The framers of the *United States Constitution*, when they drafted Article VI, Clause 3, made clear that the officers mentioned therein would be required to take an oath of allegiance to support the Constitution. The Acts of the First Congress of the United States prescribed the form of oath or affirmation to be administered not only to the members of the Senate and the House of Representatives but also to all executive officers of the United States appointed or to be appointed before they acted in their official capacity. The Act of June 1, 1789, reads in pertinent part as follows :

I, A.B. do solemnly swear or affirm (as the case may be) that I will support the Constitution of the United States.¹²

This same oath was again enacted by the Congress on September 29, 1789.¹³

Then on April 30, 1790, the Congress repealed the Act last mentioned and in an Act for regulating the Military Establishment of the United States stated :

Sec 12. . . . That every commissioned officer, non-commissioned officer, private and musician . . . shall take and subscribe the following oath or affirmation — to wit:

I, A.B. do solemnly swear or affirm (as the case may be) to bear true allegiance to the United States of America, and to serve them honestly and faithfully against all their enemies or opposers whomsoever, and to observe and obey the orders of the President of the United States of America, and the orders of the officers appointed over me according to the articles of war.¹⁴

It is interesting to observe that after less than a year Congress had changed the required oath from one to support the Constitution to one which provided that true allegiance is due to the United States of America. For the first time a statutory requirement is enacted in which a commissioned officer, upon taking the oath,

¹² 1 Stat. 23–24 (1789).

¹³ 1 Stat. 95–96 (1789).

¹⁴ 1 Stat. 119–121 (1790).

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stated that he would not only obey the orders of the President of the United States but those also of officers appointed over him. This particular statute was reenacted in substantially the same form on March 13, 1795,¹⁵ May 30, 1796,¹⁶ March 16, 1802,¹⁷ January 11, 1812,¹⁸ and January 29, 1813,¹⁹ by the Congress, when for example, it passed laws authorizing the immediate raising of certain regiments of artillery, infantry, and light dragoons to implement or increase the military establishment.

This latter oath of "true" allegiance was the requirement until July 2, 1862, when Congress enacted the now famous "test or iron-clad oath" which was applicable to every person elected or appointed to any office under the Federal Constitution. This enactment which may be found in Chapter 128 of the Laws of 1862 reads :

That hereafter every person elected or appointed to any office of honor or profit under the government of the United States, either in the civil, military or naval departments of the public service, . . . shall, before entering upon the duties of such office, and before being entitled to any of the salary or other emoluments thereof, take and subscribe the following oath or affirmation :

I, A.B. do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted nor attempted to exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power or constitution within the United States, hostile or inimical thereto. And I do further swear (or affirm) that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States, against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God;

which said oath, so taken and signed, shall be preserved among the files of the . . . Department to which the said office may pertain. And any person who shall falsely take the said oath shall be guilty of perjury, and on conviction, in addition to the penalties now prescribed for that

¹⁵ 1 Stat. 430-432 (1795).

¹⁶ 1 Stat. 483-486 (1796).

¹⁷ 2 Stat. 132-136 (1802).

¹⁸ 2 Stat. 673 (1812).

¹⁹ 2 Stat. 796 (1813).

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offense, shall be deprived of his office and rendered incapable forever after of holding any office or place under the United States.²⁰

In retrospect the provisions of this “test oath” are of the general tenor that the one taking the oath had to say: I have never been loyal to the Confederate States of America or in any way disloyal to the United States of America. This raised the question of past loyalties; and if an individual could not properly answer the question posed, he was barred from office despite his current allegiance or loyalty. It has long been questioned whether such an oath unlawfully punished persons unable to take the oath or whether the requirement **was** a valid disqualification of the individual from holding office, based on the lawful exercise of governmental power. In answer to this question it may be stated that it has long been held in law that if an individual is unable to take the oath solely because of past conduct at a time prior to the enactment of the requirement, and the oath prescribes a punishment, it is an unconstitutional requirement.²¹ However, in considering this generally accepted rule of law it must be noted that nowhere in the opinions of Mr. Justice Field, cited below, was it suggested that the enactment of the oath was in violation of Article VI, Clause 3, of the Constitution.

Another view of the problem is best reflected by the following event. On 29 January 1864, Colonel Richard M. Edwards, Fourth Tennessee Cavalry, wrote a letter to then Secretary of War Edwin M. Stanton wherein he stated that pursuant to the authority granted by Governor Johnson of Tennessee he had raised and begun the organization of a regiment of cavalry for Union service prior to receiving a copy of the “newly prescribed oath of office requiring persons to swear that they have ‘nought sought nor accepted nor attempted to exercise the functions of any office whatever under any authority or pretended authority in hostility to the United States.’” Colonel Edwards, when elected to the State Legislature of Tennessee, had taken an oath to “support the Constitution of the United States,” but he had the misfortune to be a Representative in the State Legislature of Tennessee after the act of secession. Being loyal to the Union, he desired, despite having been “forced” by Rebel authorities to take an “oath to

²⁰ 12 Stat. 502 (1862).

²¹ See *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866); *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1866).

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support the Confederate Constitution,” clarification of his status regarding the right to hold Federal office.²²

The letter came to the attention of President Lincoln and his indorsement, which is written on the letter, to Secretary Stanton reads :

February 5, 1864

Submitted to the Sec. of War. On principle I dislike an oath which requires a man to swear he has not done wrong. It rejects the Christian principle of forgiveness on terms of repentance. I think it is enough if the man does no wrong hereafter. A. Lincoln

February 5, 1864.²³

Returning now to the decisions of the Supreme Court of the United States in the cases of *Cummings v. Missouri* and *Ex Parte Garland* it may be stated that because of these decisions and the underlying principles upon which they were based the framers of the Fourteenth Amendment to the Constitution included Section 3 thereof which states :

No person shall . . . hold any office, civil or military, under the United States . . . who, having previously taken an oath . . . as an officer of the United States . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

However, before this Amendment could be adopted by the States on July 28, 1868,²⁴ the Congress of the United States enacted on July 11, 1868, an Act prescribing an oath of office to be taken by persons from whom legal disabilities had been removed. This Act reads :

That whenever any person who has participated in the late rebellion, and from whom all legal disabilities arising therefrom have been removed by act of Congress by a vote of two-thirds of each house, has been or shall be . . . appointed to any office or place of trust in or under the government of the United States, he shall, before entering upon the duties thereof, instead of the oath prescribed by the act of July two, eighteen hundred and sixty-two, take and subscribe the following oath or affirmation :

I, A.B., do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same;

²² 7 COLLECTED WORKS OF ABRAHAM LINCOLN 169-170 (Basler ed. 1953). 1953).

²³ *Id.* at 169. (Final disposition of the problem is unknown.)

²⁴ See *Imbrie v. Marsh*, 3 N.J. 578, 593, 71 A. 2d 352, 366 (1950) (Oliphant, J., dissenting).

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that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.²⁵

Congress at different times did exercise the right to remove legal and political disabilities imposed by Section 3 of the Fourteenth Amendment on behalf of certain individuals. Of particular interest is the Act of December 14, 1869 (16 Stat. 607 (1869)), which removed the mentioned disabilities from certain individuals residing in eleven southern states.

The next time Congress had occasion to consider the matter of oath of office occurred on February 15, 1871, when it passed an Act prescribing an oath of office to be taken by persons who participated in the "late Rebellion," but who were not disqualified from holding office by the Fourteenth Amendment. This act provided :

That when any person, who is not rendered ineligible to office by the provisions of the fourteenth amendment to the Constitution, shall be . . . appointed to any office of honor or trust under the government of the United States, and shall not be able on account of his participation in the late rebellion to take the oath prescribed in the act of Congress approved July two, eighteen hundred and sixty-two, said person shall, in lieu of said oath, before entering upon the duties of said office, take and subscribe the oath prescribed in an act of Congress entitled 'An act prescribing an oath of office to be taken by persons from whom legal disabilities shall have been removed,' approved July eleven, eighteen hundred and sixty-eight.²⁶

Then, in 1872, legal and political disabilities were removed from all persons "except. . . officers in the . . . military, and naval service of the United States . . ." ²⁷

Twelve years passed and on May 13, 1884, the Congress enacted the oath which is still taken by officers of the United States Armed Forces.

I, A.B., do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose

²⁵ 15 Stat. 85 (1868).

²⁶ 16 Stat. 412-413 (1871). (This particular act was presented to the President of the United States for his approval, and not having been returned by him to the House of Congress in which it originated within the time prescribed by the Constitution of the United States, became law without the President's approval.)

²⁷ 17 Stat. 142 (1872).

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of evasion; and that **I** will well and faithfully discharge the duties of the office on which **I** am about to enter. So help me God.²⁸

The Attorney General of the United States, in discussing the purpose of the change in form of oath, stated in a letter to the Postmaster-General that it was his opinion that the form required by this particular section was intended to relieve those to whom it relates from the necessity of taking the oath required by the Act of July 2, 1862, (the test oath) and in lieu thereof to require the modified oath prescribed by the previously mentioned act of July 11, 1868.²⁹

Fourteen years later, on June 6, 1898, the Fifty-Fifth Congress of the United States enacted this brief chapter :

That the disability imposed by section 3 of the Fourteenth Amendment to the Constitution of the United States heretofore incurred is hereby removed.³⁰

This legislation was needed in order to give effect to the prohibition of Section 3; and until removed, the exercise of the functions of office by persons in office before promulgation of the Fourteenth Amendment was not lawful.³¹ Nor, as was stated by the Attorney General of the United States, in *Lawton's* case were persons who had taken part in the Civil War and had been pardoned therefore by the President before the adoption of this Amendment precluded by this section from again holding office under the United States.³²

We have considered the statutory enactments governing the oath of office for every commissioned officer appointed in the military service be he a Regular or Reservist.³³ These enactments are of importance to each officer for, as stated by Mr. Justice Brewer of the Supreme Court of the United States, "the taking of the oath of allegiance is the pivotal fact which changes the status from that of civilian to that of soldier."³⁴ Article VI, Clause 3, of the Constitution requires, beyond any reasonable doubt, that the first allegiance of any one who professes to be an American is to the Constitution of the United States.

Has this always been the view of all Americans ?

²⁸ Section 1757, Revised Statutes, as amended, 5 U.S.C. § 16 (1958).

²⁹ 13 **OPS. ATT'Y GEN.** 390 (1871).

³⁰ 30 Stat. 432 (1898).

³¹ *Griffin's Case*, 11 Federal Cases 7 (No. 5815) (C.C.D. Va. 1869).

³² 18 **OPS. ATT'Y GEN.** 149 (1885).

³³ 10 U.S.C. § 591(a) (1958) requires that officers of a reserve component subscribe to the oath set forth in Section 1757, Revised Statutes, as amended, 5 U.S.C. § 16 (1958). See 32 U.S.C. § 312 (1958) for the oath of office to be administered to National Guard officers.

³⁴ *In re Grimley*, 137 **U.S.** 147 (1890).

IV. UNSURE LOYALTY—KOREA AND THE CODE OF CONDUCT

We have had a tragic example . . . of what can happen when American soldiers are trained only for combat but not for understanding what they are fighting for or against. The seemingly incredible **success** of the enemy in eroding the will of our men captured in Korea—so that not one of them even successfully managed to engineer an escape—is not incredible really.

It was, as has been proved, due simply to the inability of those troops to resist even rudimentary arguments and persuasions concerning the nature of constitutional government and the background of the decision to resist an assault against it on a remote battlefield.³⁵

Immediately after the hostilities in Korea began, the Security Council [of the United Nations] recommended that members of the United Nations furnish assistance to the Republic of Korea in repelling the armed attack from the north. The resolutions of 25 and 27 June 1950 were followed by that of 7 July, which recommended

that all Members providing military forces and other assistance pursuant to the aforesaid Security Council resolutions make such forces and other assistance available to a unified command under the United States:

and requested that the United States designate the commander of such forces and furnish it reports of the action taken under the unified command.³⁶

In pursuance of the request, on 8 July 1950, Harry S. Truman, then President of the United States, named General Douglas MacArthur as "Commanding General of the military forces which the members of the United Nations place under the unified command of the United States,"³⁷ and action was taken to place American citizens and the nation on the firing line.

Approximately 1,600,000 Americans went to Korea to fight. Of these, 7,190 were captured by the enemy. The Army carried the heaviest burden for 6,656 were personnel therefrom (93%); 263 were Air Force (3%); 231 Marines (3%); and 40 were Navy men (1%). The Korean War ended, and a total of 4,428 American fighting men were returned from prison camps. It was ascertained

³⁵ *Admiral Burke* (Excerpts of Testimony before the Senate Armed Services Subcommittee), *The New York Times*, Jan. 24, 1962, p. 14, col. 4.

³⁶ Baxter, *Constitutional Forms and Some Legal Problems of International Command*, 29 BRIT. YB. INT'L L. 333 (1952).

³⁷ Statement by President Truman, *United States Policy in the Korean Crisis*, DEP'T OF STATE PUB. NO. 3922, at 67 (1950), as quoted by Baxter, *supra* note 36, at 334.

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at this time that **2,730** Americans had died while being **detained**.³⁸ The death toll was **38%**, the worst since the Revolutionary War, when approximately **33%** passed away.³⁹

It is a general rule of law, long recognized, that a soldier taken prisoner remains a member of the service in the same status, entitled to all rights and privileges, and responsible for all obligations to his country except those rendered impossible or illegal.⁴⁰ While not subject to the discipline of his own army, while in the status of a prisoner, the soldier prisoner is, upon return to his own army, subject to trial by court-martial "for such offenses as criminal acts or injurious conduct committed during his captivity against other officers or soldiers in the same status."⁴¹

In short, the prisoner is always a soldier. American officers were prisoners of war during the Korean conflict and the misbehavior of a few was indeed startling. Early on the morning of **9 July 1950**, four days after our Armed Forces first engaged the enemy, an American officer prisoner had this, among other things, to say to the world via radio broadcast:

We did not know at all the cause of the war and the real state of affairs, and were compelled to fight against the people of Korea. It was really most generous of the Democratic People's Republic of Korea to forgive us and give kind consideration for our health, for food, clothing, and habitation.

and

Dear friends, we, all prisoners, solidly appeal to you as follows: the armed intervention in Korean internal affairs is quite a barbaristic, aggressive action to protect the benefit of the capital monopolists of the U.S.A. Let us fight for right against wrong, bravely opposing to be mobilized into such a war against Russia.⁴²

This officer had been a prisoner for about 48 hours.

When the conflict ceased, on **27 July 1953**, after the signing of the armistice at Panmunjon, Korea, **204** Army officer prisoners

³⁸ U.S. DEP'T OF DEFENSE, ADVISORY COMMITTEE ON PRISONERS OF WAR, **POW . . . THE FIGHT CONTINUES AFTER THE BATTLE** [referred to hereafter as "POW"] (1955), pp. vi, 8, 80.

³⁹ *Id.* at 25. (A detailed study of maltreatment of prisoners of war may be found in Levie, *Penal Sanctions for Maltreatment of Prisoners of War*, 56 AM. J. INT'L L. 433 (1962).

⁴⁰ Note, *Misconduct in the Prison Camp*, 56 COLUM. L. REV. 709, 714 (1956).

⁴¹ WINTHROP, *MILITARY LAW AND PRECEDENTS* 92 (2d ed. 1920). (See also UNIFORM CODE OF MILITARY JUSTICE. No attempt has been made to codify completely all obligations and privileges.)

⁴² KINKEAD, *op. cit. supra* note 4, at 18-19, 28.

came home.⁴³ Of those returning (after full and complete screening by the four review boards established in Headquarters, Department of the Army) five Army officers were tried by court-martial for their activities. Of these five officers, two were acquitted and three convicted.⁴⁴ Let us look at the misconduct of the latter group.

THREE WHO WERE CONVICTED

1. *United States v. Fleming*:

Repatriated from a Korean prisoner of war camp on 4 September 1953, this officer was, between 23 August and 23 September 1954, tried by general court-martial at Fort Sheridan, Illinois, for acts of misconduct while a prisoner of war.

General Court-Martial Order No. 52 (Corrected Copy), Headquarters, Department of the Army, Washington 25, D. C., 10 September 1957, contains the charges and specifications, pleas, findings, sentence, actions of reviewing authorities, and the final order of the Secretary of the Army that at midnight, 12 September 1957, the accused ceased to be an officer of the Army: Having been sentenced to be dismissed from the service, and to forfeit all pay and allowances by the court the sentence was approved and carried into execution. His crimes in essence were that while an officer of the United States Army in a prisoner of war camp with rank superior to his fellow prisoners, many of whom were enlisted men, he voluntarily collaborated with his captors in the preparation and dissemination of propaganda designed to promote disloyalty and disaffection among troops of the United States.⁴⁵

2. *United States v. Alley*:

Before a general court-martial which convened at Fort George G. Meade, Maryland, 22 August through 3 November 1955, this officer was arraigned and tried for certain of his actions while a prisoner of war in Korea.

General Court-Martial Order No. 34, Headquarters, Department of the Army, Washington 25, D. C., 12 September 1958, contains the charges and specifications, pleas, findings, sentence, actions of

⁴³ Tentative Report (CSGTA-363), "Battle Casualties of the Army," being prepared by the United States Army Data Services and Administrative Services Command (USADCS), a Class II activity under the jurisdiction of The Adjutant General, Department of the Army.

⁴⁴ KINKEAD, *op. cit.* *supra* note 4, at 68.

⁴⁵ See CM 377846, Fleming, 19 CMR 438 (1955), *aff'd*, 7 USCMA 543, 23 CMR 7 (1957).

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reviewing authorities, and the final order of the Secretary of the Army that the accused as of midnight, 22 September 1958, ceased to be an officer of the Army. His sentence as finally approved and ordered executed provided for dismissal, forfeiture of all pay and allowances, and confinement at hard labor for five years.

The accused's violations of laws of the United States were numerous, but in brief they amounted to communicating with the enemy, while a prisoner of war without proper authority. Among his acts of misconduct he held intercourse directly and indirectly with the enemy by wrongfully joining with, participating in, and leading discussion groups sponsored by the enemy, wherein opinions were expressed, among others, that the United States had unlawfully interfered in a civil war in Korea and that the United States was an illegal aggressor in the Korean Conflict; and by asking the enemy in what way he could improve his presentations. Additionally, he gave to the enemy certain military information concerning the use and fire direction of United States Army artillery.⁴⁶

3. *United States v. Liles:*

Captured by the enemy in Korea on 28 October 1950, this officer was repatriated in September 1953 as a part of "Operation Big Switch." For his acts of misconduct while a prisoner of war he was tried before a general court-martial which convened at Fort Lewis, Washington, from 21 November to 21 December 1955.

General Court-Martial Order No. 14, Headquarters Sixth Army, 21 February 1956, contains the charges and specifications, pleas, findings, sentence, and action of the convening authority.

The accused was found guilty of the offenses of aiding and knowingly communicating, corresponding, and holding intercourse with the enemy while a prisoner of war in Korea and by making recordings which were inimical to the interests of the United States. Sentenced to be reprimanded, among other things, the sentence was approved and ordered executed by Lieutenant General Robert N. Young, then Commanding General, Sixth Army.

His reprimand reads in part as follows :

The court-martial, by its sentence, could have sentenced you to dismissal, imprisonment, and forfeiture of all pay and allowances. It is your good fortune that the court-martial limited its punishment to suspension from rank for 24 months and to a reprimand. Your conduct, as reflected in the findings of the court-martial, and as fully supported by the record

⁴⁶ *Aff'd*, *United States v. Alley*, 8 USCMA 559, 25 CMR 63 (1958). See CM 387487, *Alley* (BR, 31 Aug. 1956).

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of **your** trial, discloses that you, an officer of the Regular Army, with the advantage of an education tendered you by the people of the United States in the United States Military Academy at West Point, with a background of many years of service in various ranks and assignments in the United States Army, and in spite of the full and positive knowledge you must have gained by your education and experience, as above outlined, of the conduct expected and required of an officer, supinely complied with the dictates of your captors and otherwise conducted yourself in a servile, craven, and unsoldierly manner for the obvious purpose of securing favored treatment for yourself while a prisoner of war. Although you well knew that your participation in the armed conflict did not end when you were taken prisoner, and that it was your positive duty to carry on the conflict to the best of your ability as a prisoner of war, offering only that degree of cooperation contemplated by international law and holding yourself ever in readiness to escape and resume the fight, you chose to damn your country and its representatives, to hold the American way of life up to ridicule and contempt, and to extoll the practices and the concepts of a deadly enemy. In committing this heinous crime you made recordings at the request of said enemy, the purpose of which was fully known to you, namely, use as a psychological warfare weapon against your country and its forces. The odiousness of your actions and of your philosophy is clearly evidenced when compared with the steadfastness and the fortitude displayed by many other officers and enlisted men, including many of very limited service, in refusing information **to**, or cooperation of any kind or description with, their unprincipled captors. Furthermore, the conduct of which you stand convicted occurred at a time when other, and loyal, American soldiers and officers were fighting and dying in the defense of the United States. You have held personal safety and comfort above duty, honor, and country, and, in so doing, have deliberately violated your oath as a citizen of the United States and as an officer of the United States Army. Your actions have not only brought disgrace upon yourself, but upon the Army and upon all of those who wear its uniform, and have caused me to harbor the gravest doubts as to your fitness for continued membership and service in the United States Army.⁴⁷

While it is clear that Fleming, Alley, and Liles were a small minority it is beyond question that they exhibited negative patriotism and violated their oaths as officers of the United States Army. These three were three too many.

In an effort to solve the problem of the conduct of military personnel while in a prisoner of war status, the Secretary of Defense, then Charles E. Wilson, on 7 August 1954 directed that a committee be formed under the chairmanship of **Mr.** Carter L. Burgess, the Assistant Secretary of Defense (Manpower, Personnel, and Reserve). This *ad hoc* committee, most of whom were military

⁴⁷ Gen. Court-Martial Order No. 14, Hq, Sixth U. S. Army (21 Feb. 1956); CM 389036, Liles (21 Feb. 1956) (review of petition for new trial in Office of the Judge Advocate General, Dep't of Army) (denied).

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personnel, developed the major issues involved and established a fundamental plan of study which was submitted to the Secretary for approval. As a result of the work of this group, on 17 May 1955, the Secretary appointed the Defense Advisory Committee on Prisoners of War.⁴⁸ This latter committee was known as the "Burgess" Committee and was composed of ten members—five civilian and five military (from all services), with Secretary Burgess as Chairman.

Secretary Wilson's terms of reference were tendered in a memorandum to Mr. Burgess which read in part as follows:

I am deeply concerned with the importance to our national security of providing Americans who serve their country in battle with every means we can devise to defeat the enemy's techniques. To assure the success of our Armed Forces it is equally as essential to arm them with the best weapons of the mind and body as it is to provide them with the machines of war.

Our national military needs must be met. This requires that each member of the Armed Forces be thoroughly indoctrinated with a simple easily understood code to govern his conduct while a prisoner. However, this military need must be met in a manner compatible with the principles and precepts basic to our form of government. . . .

. . . I request that you consider the methods we may expect our potential enemy to employ, the obligation which national military needs impose on members of the Armed Forces and the obligation of the United States to afford protection to its citizens in the custody of a foreign power. I direct your deliberation toward the development of suitable recommendations for a Code of Conduct and indoctrination and training on preparation for future conflict. You will consider certain other related Prisoner of War Problem areas which I will make known.⁴⁹

With these guidelines in hand the "Burgess" Committee met constantly for over two months, and on 29 July 1955 they transmitted to the Secretary their proposed Code of Conduct.

Nineteen days later, on 17 August 1955, the President of the United States promulgated Executive Order No. 10631 wherein was prescribed for the Armed Forces of the United States a six point Code of Conduct. The Executive Order provides in pertinent part that: ". . . every member . . . is expected to measure up to the standards embodied in this Code of Conduct while he is in combat or captivity."⁵⁰ Stated another way the purpose of the Code is to

⁴⁸ Prugh, *The Code of Conduct for the Armed Forces*, 56 COLUM. L. REV. 678, 679 (1956).

⁴⁹ POW, *op. cit.* *supra* note 38, at 37.

⁵⁰ U. S. DEP'T OF DEFENSE, PAMPHLET NO. 1-16, THE U. S. FIGHTING MAN'S CODE, at II (1959).

aid future American prisoners of war in their fight for their minds, lives, loyalty, and allegiance to America.

Will it?

From the day of publication both Executive Order No. 10631 and the Code of Conduct have been the basis of a series of provoking problems.⁵¹ One of the leading questions being: is the Code of Conduct law or duty? In this regard, even a cursory reading of the Code reveals that it is applicable to *all* service members, and, therefore, should be of great concern to *all* Americans.

Is the Code law? It may be stated as a general rule that law is any written or positive requirement, or collection of regulations, prescribed under the authority of the state or nation, whether by the people in the constitution of the nation, as the fundamental or Constitutional law, or by the legislature in its statute law, or by the treaty-making power vested in the Government, or by municipalities in their ordinances. The Code of Conduct meets none of the foregoing requirements. To bolster this conclusion let us consider the words of Carter L. Burgess on this matter:

The committee that drew up the Code, after listening to former prisoners of war, ranging from general to private, and after consulting with nationally known experts in the field of law . . . realized that some [prisoners] might not measure up to the standards of the Code. However, *the Code provides no penalties*. It is not definitive in its terms of offenses; rather, it leaves to existing laws and the judicial processes the determination of personal guilt or innocence in each individual case.⁵² [Emphasis supplied.]

Moreover,

The resistance required by the Code is opposition to the insidious conquest of the thoughts and loyalties of our prisoners of war. The means available are those moral means that are all that is left to the unfortunate prisoner of war who, as the Code indicates, must put his trust in his God and his country.⁵³

The obvious conclusion is that the drafters of the Code of Conduct foresaw the specific provisions thereof as the duty of the American fighting man and not as law.⁵⁴ Nowhere is mention made by them of any criminal statute or provision that otherwise

⁵¹ Detailed studies may be found in: Manes, *Barbed Wire Command*, 10 MIL. L. REV. 1 (1960); Prugh, *supra* note 48, at 678-707; Note, *Misconduct in the Prison Camp*, 56 COLUM. L. REV. 709 (1956).

⁵² Burgess, *Prisoners of War*, 56 COLUM. L. REV. 676 (1956).

⁵³ *Id.* at 677.

⁵⁴ The Judge Advocate General of the Army has expressed the same conclusion in the following opinions: JAGJ 1961/8391 (15 May 1961); JAGW 196111140 (23 June 1961).

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regulates so much of the American soldier's conduct. Existing law which is contained in Articles 99, 100, 104, and 105, *Uniform Code of Military Justice* has not been changed.⁵⁵

But what is duty? Common sense would say: duty is that which one is bound to do or under obligation to do. This then poses the question: what is one committed or required to do with regard to the Code of Conduct? A precise reading of the Code reveals that the provisions thereof in the main are neither mandatory nor directive. Rather they are but statements of expectations—and this is what the Commander-in-Chief of the Armed Forces stated when he promulgated the Executive Order that published the Code—“ . . . every member of the Armed Forces of the United States is *expected* to measure up to the standards embodied in this Code of Conduct” [emphasis supplied].⁵⁶

The Code, then, is the fighting man's belief and assists in guiding him to decisions.

Many skirmishes, battles, and wars have passed since the First Congress enacted the first oath of allegiance, but American officers of the armed forces will face other wars today and tomorrow that will test their credo.

The armed forces are preparing for future conflict through intensive study, research, training, and maneuvers. The military in an effort to escape the old cliché that they invariably are preparing to fight the last war, has made an extreme effort to develop forward looking concepts of strategy and tactics.⁵⁷ A leading American military writer after viewing the Seventh United States Army in “Exercise Winter Shield—I” during early February 1960 stated :

The Army is certainly not preparing to fight World War II over again. It can, rather, be charged with reaching too far into the future and trying to develop battle tactics that it has neither the equipment nor the experience to implement.⁵⁸

But has the Army advanced techniques to fit the mind of the leader to future conflict? In its study the Secretary of Defense's

⁵⁵ The relationship of these Articles to the Code of Conduct is discussed in U. S. DEP'T OF ARMY, PAMPHLET 27-161-2, 2 INTERNATIONAL LAW 98-100 (1962).

⁵⁶ U. S. DEP'T OF DEFENSE, op. cit. supra note 50, at 11.

⁵⁷ Douglass, *Court-Martial Jurisdiction in Future War*, 10 MIL. L. REV. 47 (1960).

⁵⁸ Baldwin, *Winter Shield I*, The New York Times, Feb. 9, 1960, p. 10, col. 3.

Advisory Committee on Prisoners of War stated⁵⁹ that the battle for loyalty can be won if a uniform and coordinated training program is instituted by the military services. The program to be in two phases, first, general training of a motivational and informational nature that would be conducted "throughout the career of all servicemen," and second, specific training for combat-ready troops from the lowest enlisted grade to the highest commissioned rank. The committee urged that coordination be "affected with civilian educational institutions, churches and other patriotic organizations to provide understanding of American ideals."⁶⁰ While this latter recommendation is praiseworthy it must be realized that such is probably impossible to achieve. The soldier who has not been taught in his early childhood pride in country and self, a sense of honor, and duty must be accepted by the services for what he is. An attempt to develop the sought after stature of personal integrity and character, while desirable, is expecting too much.

The man cannot be completely made over—the public would not stand for it, for a democratic form of government is always directed by the current of thought in the many cities, towns, and hamlets of the nation. Moreover, the services haven't the time to accomplish this task. The services may have the cream of American manhood, but, at best, this is a cross-section of the communities of the nation. The teaching of the services can only hope to inculcate and renew in the American fighting man the desire to live his life on the battlefield and in the prison camp, if necessary, so that whatever happens he can be self-respecting and conscience free.

The Code, then, is the services' instructional vehicle. It is the center of a program that will teach behavior in event of capture, foster the fighting strength of individual units, and perhaps provide for some the will to resist.

Soon after the publication of the Code the Department of the Army published two training circulars on the general subject,⁶¹ and the latter of the two provided in paragraph 3b thereof:

⁵⁹ POW, *op. cit.* *supra* note 38, at 15.

⁶⁰ *Ibid.*

⁶¹ U. S. Dep't of Army, Training Circular No. 21-1, Code of Conduct (7 Oct. 1955); U. S. Dep't of Army, Training Circular No. 21-2, Training for Individual Combat Effectiveness (3 Nov. 1955). (Both were superseded by Army Reg. No. 350-30 (30 Dec. 1957 with Changes 1 dated 24 June 1959) which is supplemented by U. S. DEP'T OF DEFENSE, PAMPHLET No. 1-16, THE U. S. FIGHTING MAN'S CODE (1959).

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In the administration of military justice, persons accused of misconduct before the enemy or misconduct as a prisoner of war are judged in the light of the circumstances surrounding their acts. Each person subject to the UCMJ [Uniform Code of Military Justice] remains accountable for his acts even while isolated from friendly forces or while held by the enemy.

Accordingly, the military services are not expecting the convictions of some Korean prisoners of war to provide, in the future, a self-sufficient deterrent force for unsure loyalty. The deterrent now provided is twofold; first, the penal standard of the Uniform Code of Military Justice, and second, the higher professional standard of the Code of Conduct which appeals to the highest interests of the man and the soldier.

But what of a situation where the issue is not loyalty or disloyalty, but loyalty to whom? This is the problem of divided loyalty which requires value judgments of the highest order.

V. DIVIDED LOYALTY—THE STATE VERSUS THE FEDERAL GOVERNMENT

On 4 March 1861,

While the inaugural address was being delivered [in Washington, D.C., and] devoted altogether to saving the Union without war, insurgent agents were . . . seeking to destroy it without war—seeking to dissolve the Union and divide effects by negotiation. Both parties deprecated war, but one of them would make war rather than let the nation survive, and the other would accept war rather than let it perish, and the war came.⁶²

From the original colonies, and the maritime endeavors and militia organizations thereof, the Armed Forces of the United States were born. A regular establishment has existed since 14 June 1775, and, in time of need, volunteers or draftees from civilian life have supplied the manpower and supplies needed to accomplish the tasks faced by the nation. It must be admitted that America has never been enthusiastic in its attitude toward the armed forces. The general theme has been that any American desiring military service could join the state militia and serve not only his country but his state as well.

This had been the predominant view even though men like Washington and others had constantly complained that men thus preferred to serve in organizations that were less efficient than the continental line regiments.

⁶² *Lincoln's Second Inaugural Address*, WE HOLD THESE TRUTHS 265-266 (Brown ed. 1948).

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Finally the voices of preparedness were heard. In **1802** the United States Military Academy became a reality and from this educational institution from that time until after World War I developed the officers of the Regular Army. Generally, they were a dedicated, professionally efficient, honest, and loyal group of Americans who served with distinction, valor, and loyalty throughout the War of 1812, the Indian Wars, the Mexican War, and the periods of peace that intervened. While the above is true, the sad fact remains that the civilian leaders of government, and the nation generally, because of the success of our arms during these times failed to recognize, until it was too late, that soldiers, too, were subject to the same loyalty to both their state and the federal government as were their civilian counterparts.

The Civil War broke upon the landscape of America and disclosed that the national military class while possessed of a fine standard of professional competence had not, along with many others, been endowed with the love of nationalism when it was opposed by sectionaism.

Records reveal that the Confederate States of America during the period **1861-1865** commissioned **460** general officers of whom **181 (39.3%)** had been officers of the United States Army and that after 1 November **1860, 286** officers of the United States Army left the service and joined the Confederacy. Of the latter group **187 (65.3%)** were graduates of the United States Military Academy.⁶³

Clearly it would be impossible to discuss the reasons behind the choice made by each of the officers concerned or to select those for discussion that would be entirely satisfactory to all interested persons. I choose to name but three officers of the United States Army who resigned their commissions and joined the Confederacy and three United States Army officers who stayed with the Union. Each of the individuals named was born in a southern state, appointed to the United States Military Academy from a southern state, graduated from the Military Academy, accepted a commission in the Regular Army of the United States, and was on active duty at the time he made his decision to go South or stay North.

⁶³ HEITMAN, HISTORICAL REGISTER OF THE UNITED STATES ARMY 838-845 (1890).

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A. THREE WHO WENT SOUTH

1. *Peter Gustavus Toutant Beauregard:*

Born in Louisiana he entered West Point from his native state on 1 July 1834. On 1 July 1838 he graduated second in his class and was commissioned a second lieutenant of artillery. Six days later, however, he transferred to the engineers. "Old Bory" resigned his Regular commission on 28 February 1861 and joined the Confederacy. He eventually became a general in the Army of the Confederate States of America.⁶⁴

2. *Robert Edward Lee:*

This native Virginian was appointed to the Academy from that state. He was a cadet from 1 July 1825, until 1 July 1829. Upon graduation he stood second in his class and was commissioned a brevet second lieutenant of engineers. Resigning, in April 1861, his Regular Army commission "Marse Robert" was eventually to attain the rank of general-in-chief of the Army of the Confederacy.⁶⁵

3. *James Longstreet:*

Born in South Carolina and appointed to the Academy from Alabama he became a cadet on 1 July 1838. Upon graduation on 1 July 1842 he stood 54th in his class and was commissioned a brevet second lieutenant of infantry. Resigning on 1 June 1861, "Old Pete" was to become a lieutenant general in the Army of the South.⁶⁶ Lee called him "my war horse."

B. THREE WHO STAYED NORTH

1. *Barton Stone Alexander:*

This Kentuckian came to the Academy from his native state as a cadet on 1 July 1838. He graduated seventh in the class of 1842 and was commissioned on 1 July as a brevet second lieutenant of engineers. When the War Between the States ended, he was a brigadier general.⁶⁷

2. *George Henry Thomas:*

He was another Virginian who came to the Academy from his native state. He was a member of the Corps from 1 July 1836 until 1 July 1840. He graduated 12th in his class and was com-

⁶⁴ *Id.* at 117.

⁶⁵ *Id.* at 406.

⁶⁶ *Id.* at 417.

⁶⁷ *Id.* at 83.

missioned a second lieutenant of artillery. "Pap" was a major general when the Civil War ended.⁶⁸

3. *Henry Davies Wallen*:

This native of Georgia entered the Military Academy from Florida. A cadet from 1 September 1836, until 1 July 1840, he stood 34th in the graduating class and was commissioned a second lieutenant of infantry. One star appeared on his personal flag when he left the service.⁶⁹

C. **THE TWO VIRGINIANS**

While all of those mentioned and unmentioned must have faced the problem presented with a tragic sense of duty, two of the foregoing six officers were tapped for a particular place in the history of America, and it is obligatory that the reason for their particular choice be placed under scrutiny in the light of their oath of allegiance to the Constitution of the United States..

Robert Edward Lee and George Henry Thomas were Virginians by birth and desire. Both were well borne and well reared, of nearly the same cultural background, and spoke the same language. Each had been formally educated in a school which was later appraised by Thomas in these words: "I venture unhesitatingly to say. . . that no other institution of learning in the country has contributed more to the advancement of science and literature than the Military Academy at West Point."⁷⁰ Additionally Lee had been the ninth superintendent of the United States Military Academy and had Thomas on the academic staff as an instructor of artillery and cavalry. Later they served together in the 2d Cavalry Regiment where Lee was initially the Executive Officer and Thomas commanded a squadron consisting of A and F Companies, the "Mobile Grays" and a bay horse troop.⁷¹

Two southern gentlemen bound by tradition and association with families and friends, state and section, education, office, duty, honor, and country and with sworn allegiance to the flag thereof came to the fateful day of decision. Where do I go? With my native state or the Federal Government?

Colonel Lee made the decision first. He was in Texas when he declared, unofficially, his allegiance to his state. Having com-

⁶⁸*Id.* at 637.

⁶⁹*Id.* at 671.

⁷⁰ MCKINNEY, *EDUCATION IN VIOLENCE* 9 (1961).

⁷¹ CLEAVES, *ROCK OF CHICKAMAUCA* 66-56 (1948).

pleted a reading of General Winfield Scott's paper "Views Suggested by the Imminent Danger, October 29, 1860, of a Disruption of the Union by the Secession of One or More of the Southern States"⁷² Colonel Lee had a conversation with Charles Anderson and Doctor Willis G. Edwards. It was during this conversation that Doctor Edwards posed the question of whether a "man's first allegiance was due his state or the nation. Lee's courteous reticence vanished. Instantly he spoke out, and unequivocally. He had been taught to believe, he said, and he did believe that his first obligations were due Virginia."⁷³ And this despite letters probably to his son Custis wherein the thoughts were expressed that the preservation of the Union was the only hope and should be clung to until the very end, for secession was nothing but revolution.

. . . Still a Union that can only be maintained by swords and bayonets, and in which strife and civil war are to take the place of brotherly love and kindness has no charm for me. I shall mourn for my country and for the welfare and progress of mankind. If the Union is dissolved, and the Government disrupted, I shall return to my native state and share the miseries of my people, and save in defense will draw my sword on none.⁷⁴

These were Colonel Lee's principles and these he followed. On 20 April 1861, after long talks with Francis Preston Blair, who had been authorized by President Lincoln to "ascertain Lee's feelings and intentions,"⁷⁵ and General Scott, Lee wrote among others these two letters; one to the Union Secretary of War, the Honorable Simeon Cameron, and the other to his cousin Roger Jones who was then an United States Army officer. To Secretary Cameron he said :

Sir:

I have the honor to tender the resignation of my commission as Colonel of the 1st Regt. of Cavalry.

Very resp'y Your Obedient Servant.

R. E. Lee

Col. 1st Cav'y ⁷⁶

⁷² 1 FREEMAN, R. E. LEE 418 (1934). An interesting story related by Mr. Freeman concerns the fact that Lee while Commandant of West Point saw the Class of 1854 graduate with his son Custis at the head of the class. Forty-six graduates were in the mentioned class and they received their diplomas while wearing a class ring which had for its emblem a "mailed hand holding a sword with the motto, 'When Our Country Calls.'" It was prophetic, for of those still in the service when the Civil War commenced 23 remained with the Union and 14 became Confederates. See *id.* at 346.

⁷³ *Id.* at 418.

⁷⁴ *Id.* at 421.

⁷⁵ 4 NICOLAY AND HAY, ABRAHAM LINCOLN 98 (1904).

⁷⁶ 1 FREEMAN, *op. cit. supra* note 72, at 440.

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To his cousin he wrote :

Arlington, 20 April, 1861

My dear cousin Roger,

I only received today your letter of the 17th. Sympathizing with you in the troubles that are pressing so heavily on your beloved country, I entirely agree with you in your notions of allegiance. I have been unable to make up my mind to raise my hand against my native State, my relatives, my children, my home. I never desire again to draw any sword save in the defense of my State. I consider it useless to go into the reasons that influenced me. I can give you no advice. I merely tell you what I have done that you may do better.

Wishing you every happiness and prosperity,
I remain faithfully

your kinsman
R. E. Lee⁷⁷

What did Lee mean when he wrote: "I merely tell you what I have done that you may do better."? Research has not disclosed the answer ; the reader must decide for himself.

Fort Sumter fell, Virginia seceded, and Mr. Lee, "The Gray Fox," went South.

Meanwhile, Lee's good friend Major George H. Thomas came to grips with his problem.

Leaving Texas, on the second leave of absence he had taken in twenty years of service, he took with him his slave woman because he could not force himself to sell another human being. George H. Thomas would undoubtedly have claimed, if questioned, that the Constitution of the United States recognized slavery.⁷⁸

Reaching Virginia, Thomas left the slave woman at his home and proceeded North to Washington and then to New York. While there he received a letter, during March 1861, from a friend of Governor John Lechter of Virginia, and his, who was stationed at the Virginia Military Institute, wherein two questions were posed to Thomas :

1. Would he resign from Federal Service, and if so
2. Would the position of Chief of Ordnance, of the State of Virginia, be acceptable?

Major Thomas, on 12 March 1861, answered directly to Governor Lechter as follows :

⁷⁷ BROOKS, LEE OF VIRGINIA 91 (1932).

⁷⁸ VAN HORNE, THE LIFE OF MAJOR GENERAL GEORGE H. THOMAS 16 (1882).

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I have the honor to state, after expressing my most sincere thanks for your kind offer, that it is not my wish to leave the service of the United States as long as it is honorable for me to remain in it, and, therefore, as long as my native State remains in the Union, it is my purpose to remain in the army, unless required to perform duties alike repulsive to honor and humanity.⁷⁹

Thomas, not unlike Lee, was bothered by his conscience and his duty. Then, on 10 April, Major Thomas received orders to proceed to Carlisle Barracks, Pennsylvania, to reorganize and equip the 2d Cavalry Regiment.⁸⁰ In complying with this order he took a train to Carlisle and while enroute he heard of the attack on Fort Sumter. Arriving at Carlisle, Thomas wrote his wife: "Whichever way he turned the matter over in his mind, his oath of allegiance to his Government always came uppermost."⁸¹ He then wrote of his decision to his sisters, Judith and Fanny Thomas, and the aftermath was legend; for:

1. His sisters refused to acknowledge his existence or permit his name to be mentioned in their presence.⁸²

2. They never answered this letter and cut the tie of friendship and blood, to the extent that after the war they told Union officers that they had no brother.⁸³

3. Judith and Fanny turned his picture to face the wall, destroyed his letters, and wrote him one letter requesting that he change his name.⁸⁴

George H. Thomas was a Federal. To many, Robert Edward Lee went South a noble man who chose wisely, while George Henry Thomas was classified a traitor by his family, with one exception, his brother Benjamin. He was also viewed as one to be distrusted by northern authorities. Legend has it that Mr. Lincoln appointed him a brigadier general with great reluctance and only after going to the Willard Hotel to discuss the appointment with Brigadier General Robert Anderson and General William T. Sherman. Sherman in his *Memoirs* states :

It hardly seems probable that Mr. Lincoln should have to come to Willard's Hotel to meet us, but my impression is that he did, and that

⁷⁹ 11 CALENDAR OF VIRGINIA STATE PAPERS 106, as quoted by CLEAVES, op. cit. supra note 71, at 65.

⁸⁰ JOINT COMMITTEE ON THE CONDUCT OF THE WAR, SUPPLEMENTAL REPORT TO S. REP. No. 142, 38th Cong., 2d Sess. 3 (1866).

⁸¹ COPPEE, GENERAL THOMAS 36 n. (1893).

⁸² MCKINNEY, op. cit. supra note 70, at 7.

⁸³ Id. at 90.

⁸⁴ CLEAVES, op. cit. supra note 71, at 5.

General Anderson had some difficulty in prevailing on him to appoint George H. Thomas, a native of Virginia, to be brigadier general, because so many Southern officers had already played false; **but I** was **still** more emphatic in my indorsement of him by reason of my talk with him at the time he crossed the Potomac with Patterson's Army, when **Mr.** Lincoln promised to appoint him and to assign him to duty with General Anderson.⁸⁵

The appointment was effective **24 August 1861**, and was announced in War Department Special Order No. **114** of that date.

However, regarding the allegiance of R. E. Lee, Mr. Lincoln had not the slightest doubt for he wrote, on **12 June 1863**, "Erastus Corning and Others" in part as follows :

. . . Gen. Robert E. Lee [and other general officers of the Confederacy] now occupying the very highest places in the rebel war service, were all within the power of the government since the rebellion began, and were nearly as well known to be traitors then as now.⁸⁶

Be this as it may, after the War Between the States closed its actual conflict on the soil of America, President Andrew Johnson issued his amnesty proclamation of **May 29**, which document offered to all, except **14** specified groups of Confederates, amnesty and pardon if they would take a specified oath to support the Constitution and laws of the United States. Every man who took the oath was to be restored to full property rights, other than in slaves. Those, like General Lee, who were in one of the **14** excepted classes were given the privilege "to make special application for individual pardon with the assurance that 'clemency will be liberally extended as may be consistent with the facts of the case, and the peace and dignity of the United States.' "⁸⁷

Having faith in the expressed intentions of President Johnson, and despite his indictment, on **7 June 1865**, for treason against the United States by a grand jury sitting at Norfolk, Virginia, under Judge John C. Underwood, General Lee, through General U. S. Grant, sent this application for pardon to the President of the United States :

Richmond, Virginia, June 13, **1865**.

Sir: Being excluded from the provisions of the amnesty and pardon contained in the proclamation of the **29 ult.**, I hereby apply for the benefits and full restoration of all rights and privileges extended to those included in its terms. I graduated at the Military Academy at West Point in June **1829**; resigned from the United States Army, April, **1861**;

⁸⁵ SHERMAN, MEMOIRS **192-193 (1957)**.

⁸⁶ **6** COLLECTED WORKS OF ABRAHAM LINCOLN **265** (Basler ed. **1953**).

⁸⁷ **4** FREEMAN, *op. cit.* *supra* note 72, at **201**.

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was a general in the Confederate Army, and included in the surrender of the Army of Northern Virginia, April 9, 1865. I have the honor to be, very respectfully,

Your obedient servant,
R. E. Lee.⁸⁸

General Grant recommended "that Lee's application for amnesty and pardon be allowed."⁸⁹

The individual pardon was never granted and on 15 February 1869 it was made a matter of record that no further action would be taken in the treason indictment against General Robert E. Lee.⁹⁰

Was divided loyalty now laid to rest for the military officers of the United States of America? No. The problem was only to become more sophisticated and a great deal less apparent to the casual observer.

VI. DIVIDED LOYALTY—THE CONSTITUTION VERSUS THE COMMANDER-IN-CHIEF

I swear by God this sacred oath, that I will render unconditional obedience to Adolf Hitler, the Fuehrer of the German Reich and people, Supreme Commander of the Armed Forces, and will be ready as a brave soldier to risk my life at any time for this oath.⁹¹

Two August 1934 was a "Black Day" in the history of the Officer Corps of the German Armed Forces for on this day they took, pursuant to the orders of Adolf Hitler as given to War Minister Werner Von Blomberg, a new oath of allegiance.⁹² An oath not to their country, not to the Constitution of their country, but to an individual who had become the head of their nation. An oath that was to cause trouble of conscience for some who still had moral fiber to admit to themselves that what their country was doing was wrong, but an oath which permitted others to disclaim any personal responsibility for the unspeakable atrocities committed by other members of the corps in pursuance of the desires of the leader of their cause.

History has spoken of the German officer corps of 1934–1945 and the words are not pleasant to read or hear for it is plain beyond cavil that: "They have been responsible in large measure for the miseries and suffering that have fallen on millions of men,

⁸⁸ *Id.* at 204.

⁸⁹ *Id.* at 207.

⁹⁰ *Id.* at 381.

⁹¹ SHIRER, THE RISE AND FALL OF THE THIRD REICH 227 (1960).

⁹² GOERLITZ, HISTORY OF THE GERMAN GENERAL STAFF, 1657–1945, at 290 (Battershaw transl. 1953).

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women, and children. They have been a disgrace to the honorable profession of **arms**.”⁹³

To assure that no International Tribunal, be it military or civilian, says the same of the military officers of the United States of America it is incumbent upon each and every American officer to be constantly aware of his oath of allegiance to support and defend the Constitution of the United States.

But what does this mean and how is it accomplished?

The basis of the requirement for an oath of allegiance must be sought in law for it is implied by the organic law of the land, the Constitution of the United States of America, which, in the words of Mr. Justice Stone we must read “. . . as a continuing instrument of government.”⁹⁴

But, what does the Constitution have to do with an officer's oath?

In feudal times it was the lot, as has been stated, of the vassal to render unto the lord of the land *all* services — services founded on the right to govern and the duty to obey. The bond was broken by death. Thus the allegiance **of** the vassal was to the land, for allegiance ran with the land forever. The same was true of fealty to the king.

Time passed and our ancestors came to this country. The colonies were formed and for many years in this new land each of our forefathers maintained allegiance to the King of England, because they had been born subject to his jurisdiction. Then, in **1776**, these colonies dared to become free and independent states and the theory of enduring allegiance was cast adrift. The Declaration of Independence was the “Voice of America” crying in the darkness for all to hear:

We hold these truths to be self-evident: that all men are created equal; that they are endowed, by their Creator, with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights, *governments are instituted among men, deriving their just powers from the consent of the governed*; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. [Emphasis supplied.]

⁹³ INTERNATIONAL MILITARY TRIBUNAL, NAZI CONSPIRACY AND AGGRESSION **183 (1947)**.

⁹⁴ United States v. Classic, **313 U. S. 299 (1941)**.

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Americans were stating for the world to hear their desire to rule themselves by free government.

Close scrutiny of the foregoing portion of the Declaration reveals that our forefathers were saying the power of government is ultimately in the people for only the people, if such government becomes destructive of its ends, can alter or abolish the government that they have created.

They created a constitutional form of government in order to safeguard the powers which by nature they possessed. It is this Constitution which is the framework which limits the scope and authority of any officer of the government who purports to derive his authority therefrom. But what would be the consequences if those who derive their authority from the Constitution to direct the military forces of the country step outside the limiting bounds of their Constitutional authority?

A famous American general, upon his return from Korea in 1951, stated this problem for the world to hear:

I find in existence a new and heretofore unknown and dangerous concept that the members of our armed forces owe primary allegiance or loyalty to those who temporarily exercise the authority of the executive branch of the government, rather than to the country and its Constitution which they are sworn to defend.

No proposition could be more dangerous. None could cast greater doubt upon the integrity of the armed services.

For its application would at once convert them from their traditional and constitutional role as the instrument for the defense of the Republic into something partaking of the nature of a pretorian guard, owing sole allegiance to the political master of the hour.⁹⁵

It has been asserted, without amplification, in a recent article by Commander Robert R. Monroe, that "the philosophy and logic behind this statement will not stand up under close analysis."⁹⁶ However, others do not agree with Commander Monroe. For example, Professor Morris Janowitz, a World War II veteran, educator, and Department of Defense consultant asserts, as General MacArthur feared that :

Personal allegiance, as a component of honor, has had to be changed to fit the growth of bureaucratic organization. The American constitutional system, in order to assure civil supremacy, requires that the military swear allegiance to "support and defend the constitution." The organic law has transformed allegiance to a person to allegiance to a formal

⁹⁵ *Text of Address by MacArthur before the Massachusetts Legislature in Boston*, The New York Times, July 26, 1951, p. 12, col. 2.

⁹⁶ Monroe, *Limited War and Political Conflict*, Military Review, Oct. 1962, p. 7.

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position—moreover one filled by a civilian—the President, as Commander-in-Chief. Military officers make a point of their allegiance to the Commander-in-Chief, and this act embodies allegiance to a person as well as to an office.⁹⁷

If Professor Janowitz is correct in his analysis then the statement of General MacArthur is of great moment, but if he is wrong then perhaps Commander Monroe's assertion is true.

While the Janowitz theory may be accepted by some of the officer corps the biggest majority have not, in my opinion, abrogated their sworn oath to the Constitution. This I believe even Professor Janowitz must recognize for his last two sentences in the aforementioned quote are inconsistent. However, if the Janowitz proposition is correct, American officers, like the Nazi officers of 1934 would, to all intents and purposes, be swearing allegiance to an individual who had become for the moment the President of the United States of America. This theory of abrogation of fealty to an individual is perhaps supportable in the world of fiction,⁹⁸ for a few officers, but in reality the fictional theory is unacceptable for the officer corps of the Armed Forces of America has accepted, as the yardstick of fealty, the Constitution of the United States of America. So that I am not misunderstood however, let me add that, in my opinion, the officer corps, in the main, fully realizes that their exclusive responsibility is to the President, as Commander-in-Chief, for the successful operation of the armed forces in peace or in the spectrum of war be it cold, limited, or general. The President by reason of the Constitution commands the nation's forces and the doctrine of command is accepted by the military. Additionally, the officer corps of the armed forces realizes the responsibility that devolves upon the Commander-in-Chief to achieve the national objectives and purposes of the United States. As President Eisenhower recently remarked: “. . . Give military leaders a lucid explanation of the nation's policies, and they will, with rare, and easily controlled exceptions, loyally perform.”⁹⁹

But what is the situation if this explanation is not lucid or in any sense satisfying? Since the officer has taken an oath to defend the Constitution he must permit the Constitution with its provided checks and balances to operate. Under these provisions the

⁹⁷ JANOWITZ, *THE PROFESSIONAL SOLDIER* 220 (1960).

⁹⁸ KNEBEL AND BAILEY, *SEVEN DAYS IN MAY* (1962). (A novel concerning seven action packed days when certain highly placed officers of the Armed Forces of the United States plan to take over the Government.)

⁹⁹ *General Eisenhower* (Letter to Senate Armed Services Special Subcommittee), *The New York Times*, Jan 24, 1962, p. 14, col. 1.

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Congress and the courts, not the military, are given the authority to review the acts of the President.

However, while awaiting the action of the courts, which often times are slow, the officer concerned may find himself obliged to commit certain acts which he might later have to personally justify before a court of law.

In 1803 John Marshall speaking in the now famous case of *Marbury v. Madison* stated: "It is, emphatically, the province and duty of the judicial department, to say what the law is."¹⁰⁰ Then, in *Sterling v. Constantin*, Chief Justice Charles Evans Hughes remarked: "What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial decisions."¹⁰¹ And further "There is no . . . avenue of escape from the paramount authority of the Federal Constitution."¹⁰²

Accordingly, the military officer like his civilian counterpart is accountable to the law as it is judicially determined to be. Perhaps it has been most clearly stated by Mr. Justice Miller in *United States v. Lee*:

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it.

It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.¹⁰³

Professor Charles Fairman of the Law School of Harvard University in a study concerned with the problems of government after an atomic attack considered, among others, the three cases just mentioned and with regard to the question of judicial review in wartime he said:

A commander who understands that it may be his duty to break the law, looking for justification to the political judgment of his contemporaries, is likely to be a reckless and arbitrary man. It sounds like Caesar who, seeking to keep within the constitution while fearful of prosecution on a charge of unconstitutional acts, finally crossed the Rubicon, and looked to his contemporaries and to history. That is wholly foreign to our notions.¹⁰⁴

¹⁰⁰ 5 U.S. (1 Cr.) 137, 177 (1803).

¹⁰¹ 287 U.S. 378, 401 (1932).

¹⁰² *Id.* at 398.

¹⁰³ 106 U.S. 196, 220 (1882).

¹⁰⁴ FAIRMAN, GOVERNMENT UNDER LAW IN TIME OF CRISIS 120-121 (1953).

Since the powers granted to the Congress and the President of the United States to wage war or maintain peace are Constitutional grants, the actions of officers of the Armed Forces of this country must be in conformity with the Constitution. This standing alone is a truism. The problem is that conformity or nonconformity with the provisions of the Constitution is determined after the act by the courts and not the executive authorities who may have ordered the act.

In summary the yardstick for measuring one's allegiance is the Constitution as interpreted by the courts.¹⁰⁵

While the Constitution solves problems involving divided loyalty on the national level does it do so in the international sphere?

VII. DIVIDED LOYALTY—NATIONAL VERSUS INTERNATIONAL MILITARY COMMAND

Certain problems of great magnitude exist in the future surrounding International Military Commands.¹⁰⁶ For example, suppose that a United Nations military force was created and that an officer of the Armed Forces of the United States was assigned to duty with such force; to whom would he owe basic allegiance—the United States or the United Nations? Which way will the tug and pull sway him? Allegiance is normally defined in terms of the bond of duty and fealty which binds an individual to his nation or government and which in turn confers upon him the status of a national. The Harvard Law School research draft on *The Law of Nationality* defines in Article 1(a) nationality as “the status of a natural person who is attached to a state by the tie of allegi-

¹⁰⁵ *Ex Parte* Milligan, 71 U.S. (4 Wall.) 2, 120 (1866). (For an excellent discussion of the President's power to use Federal troops to suppress resistance of Federal court orders see the Opinion of the Attorney General of the United States contained in 41 OPS. ATT'Y GEN. 67 (1957). Note particularly that portion of the opinion which provides that the President has the power, under the Constitution and laws of the United States, to suppress domestic violence, obstruction and resistance to Federal law and Federal court orders by the use of the National Guard and the members of the armed forces.)

¹⁰⁶ Legal problems of integrated military forces have been since World War II the subject of several learned articles. See Baxter, *Constitutional Forms and Some Legal Problems of International Command*, 29 BRIT. YB. INT'L L. 325 (1953); Bivens, *Restatement of the laws of War as Applied to the Armed Forces of Collective Security Arrangements*, 48 AM. J. INT'L L. 140 (1954); Moritz, *The Common Application of the Laws of War Within the Nato-Forces*, 13 MIL. L. REV. 1 (1961); Taubenfeld, *International Armed Forces and the Rules of War*, 45 AM. J. INT'L L. 671 (1951).

ance.”¹⁰⁷ It may be said then that the “tie of allegiance” marks the sum of the binding requirements of a natural person to the state of which he is a member. This same approach has been taken in the jurisprudence of our own courts — Mr. Justice Van Devanter speaking for the Supreme Court of the United States said: “Citizenship is membership in a political society, and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being compensation for the other.”¹⁰⁸

Accordingly, allegiance has traditionally been linked solely with the ties of nationality. In such a tradition allegiance could have no application to the relationship between individuals and international organizations. There could be no conflicts of allegiance in the traditional sense.¹⁰⁹

In reality, however, there could be conflicts of interests between the policies of the international command and the policies of an officer's own country. Suppose, that the US officer mentioned above is the commander of the force. Could he face a conflict of interest between the United Nations and the United States? This conflict could arise because international organizations, such as the United Nations, though created by their member-states, lead lives of their own. The result is that the member-states continue to exist as they did before the creation of the international organization. However, it is now obvious that such states exist alongside a new legal personality and the judgments of this new personality, as to the actions it should take, need not always coincide with the judgment of all of its members.¹¹⁰ For example, military actions undertaken by the United Nations with no original objection by the United States may develop new and unforeseen difficulties and complications, especially if the General Assembly were to recommend military action, for such action is not subject to the veto power. So much for theory. Now for current policy and the apparent state of the law.

A recent Department of the Army publication concerning civil affairs operations, contains this quotation :

¹⁰⁷ Robert W. Flournoy, Jr., and others, *The Harvard Law School Draft on the Law of Nationality*, 23 AM. J. INT'L L. Special Supplement, at 22 (1929).

¹⁰⁸ *Luria v. United States*, 231 U.S. 9, 22 (1913).

¹⁰⁹ Letter to the author from Professor Richard R. Baxter, Law School of Harvard University, Cambridge, Oct. 26, 1962.

¹¹⁰ Letter to the author from Lt. Col. Major (then) Joseph B. Kelly, The Judge Advocate General's School, U. S. Army, Charlottesville, Oct. 26, 1962.

... he [the United States commander serving under a combined command] brings to the attention of appropriate authority those policies or actions in the field of CA [civil affairs] operations that are believed to be contrary or prejudicial to international law, United States law, United States national interest, United States war objectives, or the postwar international position of the United States.¹¹¹

This policy though expressly applicable only to civil affairs operations is useful in any conflict of interest situation that may be faced by the United States commander. The United States commander under these circumstances need not take any action contrary to that taken by the combined command. Therefore, loyalty to the combined command is not breeched and, likewise, loyalty to the United States is not violated if the commander notifies appropriate United States authority that in his judgment certain actions of the combined command are against the interests of the United States. In the latter situation appropriate United States authority can take whatever action is deemed appropriate under the circumstances—this might perhaps include the recall of the commander if it were felt that he might become involved in an action incompatible with the interests of the United States.

The Regulations for the United Nations Emergency Force, issued by the Secretary General of the United Nations on **20 February 1957**,¹¹² do not speak of allegiance or call for any oath couched in such terms. However, they do emphasize the international chain of command and certain obligations the members of this force bear to it alone. Paragraph 31 thereof provides: "**Instructions.** In the performance of their duties for the Force the members of the Force shall receive their instructions only from the Commander and the chain of command designated by him." Paragraph **32** of the same Regulations discusses discretion and the noncommunication of information in these words :

Members of the Force shall exercise the utmost discretion in regard to all matters relating to their duties and functions. They shall not communicate to any person any information known to them by reason of their position with the Force which has not been made public, except in the course of their duties or by authorization of the Commander. The obligations of this Regulation do not cease upon the termination of their assignment with the Force."¹¹³

¹¹¹ U. S. DEP'T OF ARMY, FIELD MANUAL NO. **41-10: CIVIL AFFAIRS OPERATIONS 43 (1962)**.

¹¹² UNITED NATIONS SECRETARY GENERAL, REGULATIONS FOR THE UNITED NATIONS EMERGENCY FORCE **6 (1957)**. Compare CIVIL AFFAIRS HANDBOOK ITALY, SECTION **2, M 353-2** (issued by U. S. Army for guidance of Anglo-American Occupation in Sicily, **1943**) at **79-80**, where criticism or gossip concerning British commanders was forbidden to American civil affairs officers.

¹¹³ UNITED NATIONS SECRETARY GENERAL, op. cit. *supra* note **112**.

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The President of the United States may not have the power as Commander-in-Chief of the Armed Forces of the United States to dictate the conduct of an American officer in his capacity as a member of an international command.¹¹⁴ But, he does have the power of recall. Therefore, any American officer in such a command who has difficulty with his oath as an officer conflicting with his duties as an international commander may have such difficulty resolved by the President. Undoubtedly withdrawal would be the proper step, rather than to leave him in a position where he may have to violate his oath.

Though control by the Executive of an American international commander is fairly clear there appears as yet to be no control by our courts over such a commander. In 1949 Supreme Court Justice William O. Douglas made the following observation in an opinion concerning the apparent lack of the Courts' power to review certain judicial acts of General MacArthur Supreme Allied Commander:

Such a holding would have grave and alarming consequences. Today Japanese war lords appeal to this Court for application of American standards of justice. Tomorrow or next year an American citizen may stand condemned in Germany or Japan by a military court or commission.³ [3 Cases of this sort are beginning to appear—see *In re Buck*, 336 U.S. 971.1 If no United States court can inquire into the lawfulness of his detention, the military have acquired contrary to our traditions (see *Ex Parte Quirin*, 317 U.S. 1; *In re Yamashita*, 327 U.S. 1), a new and alarming hold on us.

....

It leaves practically no room for judicial scrutiny of this new type of military tribunal which is evolving. It leaves the powers of those tribunals absolute. Prisoners held under its mandates may have appeal to the conscience or mercy of an executive; but they apparently have no appeal to law.¹¹⁵

The present state of the law would appear to be that if an officer of the Armed Forces of the United States violated, as an international commander, that portion of his oath about supporting and defending the Constitution the courts are, as of now, powerless. This of course raises the question: may an American officer do something as an international commander that he could not do as a national commander? It was pointed out above that our courts may hold a military officer accountable for what he does as a national commander. Here now, it is apparent

¹¹⁴ *Ibid.*; see *id.* at para. 31.

¹¹⁵ Separate opinion of Mr. Justice Douglas in *Kolki Hirota v. MacArthur*, 338 U.S. 197, 201-204 (1949).

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that the courts, as yet, have no such complete control over him as an international commander. If the question were to be answered in the affirmative it would appear that as an international commander he possibly would not be violating his oath taken as a national commander, for his oath to support the Constitution may be applicable only when he acts as a national commander. Stated another way, the

. . . officer who becomes a permanent employee of the United Nations owes basic allegiance to it rather than to his native country.

This rule would not apply, of course, to contingents temporarily given to the United Nations for short-term **tasks**. Consequently, the contingents operating in Korea, the Congo or Egypt would not fall under this particular rule. But even in the Congo and Egypt, the officers who operate as the members of the UN command apart from national contingents are truly international officials having both the duties and privileges of such officials and consequently should owe their primary allegiance to the United Nations.¹¹⁶

Some perhaps will say the international commander has new duties, new responsibilities, and new loyalties and the national commander old duties, old responsibilities, and old loyalties. Obviously when given such an assignment any individual is put in the unenviable position of possibly betraying the interest of one command or the other, regardless of the decision he makes. Of course, it is realized that if a commander was wearing two hats, **as** Eisenhower, MacArthur, and Norstad have done that it would depend upon which hat he was wearing when he acted.

Faced with such a decision pertinent legal principles are in the very early stage of development and now contribute little, if anything, to aid in the final decision.

As Mr. Justice Douglas said: "These are increasingly important questions as collaboration among nations at the international level continues. They pose questions for which there is no precedent."¹¹⁷

The final determination rests with each individual as he answers the questions which each contending force will put to him—questions faced in a different context by Lee and Thomas 100 years ago—"Are you with us or against us?" Where is your first loyalty?

The question of loyalties, whether they be unsure or divided, has and will continue to be the concern of any American officer

¹¹⁶ Letter to the author from Louis B. Sohn, Bemis Professor of International Law, Law School of Harvard University, Cambridge, Oct. 30, 1962.

¹¹⁷ *Kolki Hirota v. MacArthur*, 338 U.S.197,205 (1949).

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who respects the honor of his oath. What conclusions can be formulated from the problems discussed in this study which may serve as a guide for him?

VIII. CONCLUSION

President Harry S. Truman recently stated: "I just happen to think that the Constitution has served us pretty well for all these years."¹¹⁸

But what of tomorrow? Exploration of space, satellites, social revolutions, drastic shifts in the international power complex, and the invention of undreamed of weapons will usher in staggering and revolutionary changes.

Questions of great importance will arise of which international commands are but one. We can of a surety expect situations in the future that will cause officers serious soul searching and inner conflicts as severe as those faced by other officers in the past. Will each of us be ready for this inner struggle?

Those who speak in awe-struck whispers of the problems, grave though they be, that confront us today, perhaps are not always acquainted with the appalling uncertainties and awful responsibilities that rested upon the statesmen of an earlier day, who furnished us with the chart and compass by which we have since sailed.¹¹⁹

We need not despair for the future of the officer corps, for the American officer captives of pro-Communist forces in Laos have set a high standard for the corps, Major Lawrence Bailey of Laurel, Maryland, and Captain Walter Moon of Rudy, Arkansas, were not found wanting for their creed in essence was duty, honor, and country.¹²⁰ Truly some will fall by the wayside but these will be small in number if commissioned officers are diligently taught good principles and maintain tried and true traditions in order to assure that future generations will maintain fidelity to the oath they take upon being commissioned an officer of the Armed Forces of the United States of America.

There are many pressures in this world of ours today which dictate against a solemn and intensive contemplation of the oath an officer takes. But I do think that more attention should be devoted to the indoctrination of young officers especially, of the obligations they as individual

¹¹⁸ Truman, *The President's Responsibility*, Military Review, Sep. 1962, p. 3.

¹¹⁹ John Bassett Moore, as quoted by Kelly, *John Bassett Moore's Concept of Recognition*, 2 J. JOHN BASSETT MOORE SOCIETY INT'L L. 19, 23 (1961).

¹²⁰ *The Code for American Prisoners of War*, The Saturday Evening Post, Sep. 29, 1962, p. 90.

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officers assume when they recite that oath. It is a responsibility that should not be taken easily. And its phraseology is disarmingly simple. When an officer swears to "support and defend the Constitution of the United States against all enemies, foreign and domestic"—he is assuming the most formidable obligation he will ever encounter in his life. Thousands upon thousands of men and women have died to preserve for him the opportunity to take such an oath.

What he is actually doing is pledging his means, his talent, his very life to his country. This is obligation that falls to relatively few men. And it should be considered as a sacred trust.

We hear much these days about the "rights" to which we are entitled as citizens of this great nation. There is less emotion about the corresponding "duties" which we inherit.¹²¹

The expressed concern of men like Admiral Burke and General MacArthur when weighed in the light of the reprimand imposed upon an Army lieutenant colonel by General Young raises the question: "What can be done?"

The enemy we fight is seeking not only land but also the minds of men. In peace and in war the American officer will be no better than his training and education. What is needed is a coordinated training and educational program for the officers of the Armed Forces of the United States on the meaning and purpose of an officer's oath.

The educational program should be similar in concept to that known as "The Code of Conduct," with one additional requirement. Each armed forces school should be required to present a course of instruction during each academic year to all student officers. A requirement of this nature is not unrealistic. For example, the majority of approved law schools of the United States require for graduation the successful completion of a course in "Legal Ethics."

It is recognized that most American officers normally will complete, many years prior to being commissioned, educational courses in United States history, civics, and perhaps constitutional government. He also may be expected to have pride in country, respect for principles, a sense of right and wrong developed by attendance at church and school and through home instruction. Nevertheless, it is felt that further development after entrance into the military service can do no harm and may do some good.

The training given by the services must be coordinated, specific, and uniform. It must be "realistic as well as idealistic. Above all,

¹²¹ Letter to the author from Admiral Arleigh Burke, U.S.N. (Ret.), Washington, Jan. 11, 1963.

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it must be presented with understanding, skill and devotion sufficient to implant a conviction of heart, conscience, and mind”¹²² that will cause each commissioned officer to accept the responsibilities and duties of his oath.

The officer corps of the military forces of the United States have, expressly and by implication, voluntarily subscribed their oath to support and defend the Constitution; *expressed* in that others may have heard the individual officer say, or seen his signature to the oath itself,¹²³ that he will maintain the supremacy and inviolability of the Government and the Constitution against forcible overthrow by domestic intrigue or foreign aggression; *implied* because there is owed to the government by each citizen allegiance which pre-dates any expressed words of promise. The declaration in words is simply what was already a fact of citizenship.

While the acts of Congress have caused different words to be used at different times by the officer corps in swearing to support and defend the Constitution, the original statute remains, in my opinion, unchanged.¹²⁴

The corps of commissioned officers of the Armed Forces of America have been and will continue to be bound to their oath; for each officer's oath is the yardstick of integrity for himself, his family, and America.

The officers of yesterday said and those of today, and tomorrow, come what may, will continue to say :

... I have a duty to perform, and I mean to perform it with fidelity, not without a sense of existing dangers, but not without hope. I have a part to act, not for my own security or safety, for I am looking out for no fragment upon which to float away from the wreck, if wreck there must be, but for the good of the whole, and the preservation of the whole, and there is that which will help keep me to my duty during this struggle, whether the sun and the stars shall appear, or shall not appear for many days.¹²⁵

My solemn oath that :

... I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith

¹²² POW, *op. cit.* *supra* note 38, at 15.

¹²³ U. S. Dep't of Army, DA Form 71, Oath of Office, 1 Aug. 1959.

¹²⁴ See Judge Oliphant's dissenting opinion in *Imbrie v. Marsh*, 3 N.J. 578, 598, 71 A.2d 352, 367 (1950).

¹²⁵ Daniel Webster, *The Constitution and the Union*, WE HOLD THESE TRUTHS 183 (Brown. ed. 1948).

OFFICER'S OATH

and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God. . . .¹²⁶

Consequently, it may be concluded that an officer has the duty to be familiar with the Constitution to which he has sworn fidelity, for his first allegiance is to the Constitution. A commissioned officer of the Armed Forces of the United States, like his civilian counterpart, is accountable to the law as it is judicially determined to be notwithstanding his standard of "implicit obedience."

Furthermore, officers of the Armed Forces of the United States must act in compliance with the directives of competent authorities.

Finally, it is incumbent upon the command structure of the United States Armed Forces to provide information to its officers to keep them well informed on constitutional matters and to provide fresh, rigorous, and imaginative courses of instruction on the meaning of an officer's oath during all phases of career schooling.

National preservation will be sustained by adherence to the principles of the Constitution which time has proven to be equal to the changing stresses that have affected our nation.

¹²⁶ Section 1757, Revised Statutes, as amended, 5 U.S.C. § 16 (1958).

COUNTERINSURGENCY: A PERMITTED INTERVENTION?*

BY LIEUTENANT COLONEL JOHN JAY DOUGLASS**

I. INTRODUCTION

Liberation wars will continue to exist as long as imperialism exists, as long as colonialism exists. These are revolutionary wars. Such wars are not only admissible but inevitable, since the colonialists do not grant independence voluntarily. . . . What is the attitude of the Marxists toward such uprisings? A most positive one. These uprisings must not be identified with wars among states, with local wars, since in these uprisings the people are fighting for implementation of their right of self-determination, for independent social and national development. These are uprisings against rotten reactionary regimes, against the colonizers. The Communists fully support such just wars and march in the front rank with the peoples waging liberation struggles.¹

This was the statement of Chairman Khrushchev in his speech of 6 January 1961 forcefully setting forth the views of the Communists toward revolution and insurgency and a "doctrine of permanent intervention."² In response to this declaration of support of uprisings against legitimate governments, the United States, under the leadership of President Kennedy began a program designed to stabilize threatened governments. In his message of 28 March 1961 to the Congress, President Kennedy advised that he had directed the Secretary of Defense to take the steps necessary to meet this threat and to orient our military forces

* This article was adapted from a thesis presented to the United States Army War College, Carlisle Barracks, Pennsylvania, while the author was a student there. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of the United States Army War College, The Judge Advocate General's School, or any other governmental agency.

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¹ Address by N. K. Khrushchev to Higher Party School, Academy of Social Sciences, Institute of Marxian-Leninism of the Central Committee, Communist Party of the Soviet Union, Jan. 6, 1961.

² Beichman, *This Miserable Issue*, Columbia University Forum, Fall 1961, p. 49.

appropriately.³ In reviewing the program some months later, Mr. Walt W. Rostow said,

. . . the whole Government under the leadership of the President, has turned with extraordinary vigor to the problem of learning how to deal with the techniques of subversion and guerrilla warfare on which the international Communist movement places such high hopes for the 1960's.⁴

It is the policy of the United States to provide a countervailing force to the communist program of planned insurrection. From this policy arose the theme of this study. Is there a legal basis for the United States to assist foreign governments in counterinsurgency? Modern instances of counterinsurgency participation need to be examined from a legal vantage point. To do this it is necessary to determine the customary international law on the subject and further to determine whether the membership of the United States in the United Nations and the Organization of American States changes, limits, or affects the law. By applying the law to recent efforts of the United States, it will then be possible to reach conclusions as to the legal authority and limitations of the United States to engage in such operations.

The question of the lawfulness of intervention by armed forces, under the law of nations, is not a new one. In 1898, Captain William B. Reynolds discussed the problem with military officers in his lectures at the United State Infantry and Cavalry School.⁵ Notwithstanding extensive study of the law of intervention during this century, the legal problem of intervention as it relates to counterinsurgency has not been resolved. Both Professor Sohn of Harvard⁶ and Professor Bishop of the University of Michigan⁷ have noted the lack of concern with this specific area of the law of intervention. Both have expressed the need for further study of the subject because of its importance. Professor Sohn believes that there should be some hard thinking about what rules "on the subject are in the best long range interest of the United States."

³ *Urgent National Needs*, Address by President Kennedy to Joint Session of Congress, May 25, 1961, in 44 DEP'T STATE BULL. at 903 (1961).

⁴ *Where We Stand*, Address by Walt W. Rostow, delivered to 1962 Democratic Women's Conference, Washington, D. C., May 21, 1962, in 46 DEP'T STATE BULL. at 967 (1962).

⁵ Reynolds, *Intervention*, Lectures, US Infantry and Cavalry School, March 1898.

⁶ Letter to the author from Professor Louis B. Sohn, Bemis Professor of Law, Harvard University, Oct. 30, 1962.

⁷ Letter to the author from Professor William W. Bishop, Professor of Law, The University of Michigan Law School, Nov. 9, 1962.

The United States cannot seek a world of law and act in disrespect of the law. Acts in accord with the law are necessary both for America's image abroad and to secure support for such policies at home. International law is a part of the law of the United States⁸ "which must be ascertained and administered by the courts of appropriate jurisdiction."⁹ A determination of the lawfulness of American assistance to the established governments in counterinsurgency may well determine other important legal questions arising not only in international courts and tribunals but in national courts as well. Examples of the legal cases which may arise are claims against the United States, war crimes charges, or the status of United States military personnel taken prisoner.¹⁰

The Soviets speak before the world in legalistic terms and have perfected a technique of misusing legal terms in "order to conceal, instead of reveal truth."¹¹ The United States must be prepared to answer in the language of the law before the forums of the world.¹²

This article is concerned with the military actions of armed forces of the United States to assist in suppressing the more violent aspects and activities of insurgent groups. While the problem of supporting insurgency is of interest, that subject is beyond the scope of this article, although certain principles may emerge which may be of guidance in any such subsequent undertaking. Nor is it the purpose of this article to consider the problem of international intervention by recognition of governments or refusal of recognition except as such matters may bear on the legality of the use of armed force. The question of whether or not to intervene as a matter of policy is not within the purview of this article. Although there may be moral implications of accepting the tar-brush of nationalism, colonialism, or imperialism in furnishing support to legitimate and established governments, these considerations do not bear on the legal problem here under investigation.

⁸ "When the United States . . . assumed the character of an independent nation, they came subject to that system of rules which reason, morality and custom had established among civilized nations of Europe. . . . The faithful observance of this law is essential to national character." KENT, *COMMENTARIES ON AMERICAN LAW* 1 (1826).

⁹ The *Paquette Habana*, 175 U.S. 677 (1900).

¹⁰ See Greenspan, *International Law and Its Protection for Participants in Unconventional Warfare*, 341 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, 30 (1962).

¹¹ Murdock, *Collective Security Distinguished From Intervention*, 56 AM. J. INT'L L. 500 (1962).

¹² Potter, *Legal Aspects of the Beirut Landing*, 52 AM. J. INT'L L. 727 (1958).

11. INTERVENTION IN INTERNATIONAL RELATIONS

Before determining the rules and principles of the international law of intervention, it is first necessary to define the term in concept and in practice. What have the students of foreign relations and international law meant by the term intervention? Is the concept universally understood? What have been the intervention and nonintervention policies and practices of nations, particularly the United States? A definition and an historical perspective of intervention clearly will provide the backdrop for the legal search.

The term "intervention" is widely used in international law and foreign relations. Despite its wide usage, it is most difficult to define its true meaning. The term is used for various situations and for various purposes by individual writers. Further confusing the problem, is the use by the same writer of the term to include situations which do not fall within his carefully delineated boundaries. Strauz-Hupe and Possony say, "intervention is a term with many legal meanings."¹³ Students of international law have utilized that meaning of the term they found convenient to accomplish their predetermined view of the legality of a particular situation with which they were concerned. Varying uses of the term prove Fenwick correct when he says that "of all the terms in general use in international law, none is more challenging than that of 'intervention.'"¹⁴

To some authorities, the term intervention means the interference of a third state into a conflict between two other powers, to include the use of armed force or the offer of good offices. They would have included the participation of the United States in World Wars I and II as examples of intervention. In fact, in Volume II of Oppenheim¹⁵ he would include such a situation in his definition of intervention whereas in Volume I of the same work he would limit intervention to an interference in the affairs of only one other state. In the latter definition, Oppenheim says that the term consists "in the dictatorial interference in the affairs of another state."¹⁶ Hall, on the other hand, (also quoted by Moore) defines intervention to include interference in the "domestic affairs of another state *irrespective* of the will of the latter"¹⁷ which in-

¹³ STRAUZ-HUPE AND POSSONY, *INTERNATIONAL RELATIONS IN THE AGE OF CONFLICT BETWEEN DEMOCRACY AND DICTATORSHIP* 379 (2d ed. 1954).

¹⁴ Fenwick, *Intervention: Individual and Collective*, 39 AM. J. INT'L L. 645 (1945).

¹⁵ 2 OPPENHEIM, *INTERNATIONAL LAW* 150 (7th ed., Lauterpacht ed. 1952).

¹⁶ 1 OPPENHEIM, *INTERNATIONAL LAW* 305 (8th ed., Lauterpacht ed. 1955).

¹⁷ HALL, *A TREATISE ON INTERNATIONAL LAW* 278 (6th ed. 1909) (*italics added*).

clusion would indicate that the act of intervention might take place with the consent of the second state. Graber,¹⁸ Lawrence,¹⁹ and the Thomases²⁰ find essential to the understanding of the term, the inclusion of the threat of force by the intervening state. It is interesting to note that few of the earlier writers indicate that intervention may include multiple interveners, as do the Thomases in their more recent comprehensive work on the subject. They define the term as follows :

Intervention occurs when a state or group of states interferes, in order to impose its will, in the internal or external affairs of another state, sovereign and independent, with which peaceful relations exist and without its consent, for the purpose of maintaining or altering the condition of things. [Italics added.]²¹

Regardless of definition, the writers proceed to include situations and problems which they classify as interventions in which consent was freely given. Most discuss at some length the question of intervention upon request of an established government to assist in repressing insurgents.

Unfortunately the difficulties surrounding the definitions are further compounded by the fact that in some international law circles, particularly in Latin America, the term is a smear word,²² a term of abuse, an epithet applied to actions of the great powers and particularly the United States. To some writers the term itself connotes illegality but other authorities categorize interventions as legal or illegal. At the other extreme, the term has no reference to legality but it is only a term defining a situation which calls for legal analysis. It is perhaps because of this confusion that Hyde indicates that the forms are so diverse and vary so greatly that the term itself is a bad one.²³ Briggs says, "The term, freighted with political overtones, has been indiscriminately employed to cover a variety of interferences and is of little value in the terminology of international law."²⁴

The fact that the term is confusing or difficult of specific definition does not permit it to be laid aside. The term is used in inter-

¹⁸ GRABER, *CRISIS DIPLOMACY, A HISTORY OF U. S. INTERVENTION POLICIES AND PRACTICES* 2 (1959).

¹⁹ LAWRENCE, *THE PRINCIPLES OF INTERNATIONAL LAW* 120 (7th ed. 1923).

²⁰ THOMAS AND THOMAS, *NON-INTERVENTION, THE LAW AND ITS IMPORT IN THE AMERICAS* 71 (1956).

²¹ *Ibid.*

²² GRABER, *op. cit. supra* note 18, at 8.

²³ See HYDE, *INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 245 (1951).

²⁴ BRIGGS, *THE LAW OF NATIONS: CASE, DOCUMENTS, AND NOTES* 960 (2d ed. 1952).

national law and diplomacy and it remains with us. As is clear, intervention is a generic term. Those who have attempted definition have really defined the species of intervention in which they are interested. This article is concerned with only one specie—that of intervening in another nation's domestic affairs by providing armed force assistance to combat insurrection. It is pertinent that we find how this particular type fits into the overall history of intervention.

Without attempting to further pit definition against definition, for the purpose of this article the definition of Hall may be used: "Intervention takes place . . . when it [State] interferes in the domestic affairs of another state irrespective of the will of the latter for the purpose of either maintaining or altering the actual condition of things within it."²⁵ Using this definition, it will be necessary to be most discriminating in referring to the writings of students on the subject of intervention to make certain that the conclusions and principles arise from situations falling within the definition used.

A. THE HISTORY OF INTERVENTION

Although the early jurists almost universally concerned themselves with the subject of intervention, they took no really definitive position as to its legality, finding occasions when it was permissible based on the "justice of the intervention."²⁶ The modern period of intervention and the interest of international lawyers and writers on the subject began with the activities and pronouncements of the Holy Alliance of Austria, Prussia and Russia during the early part of the 19th Century, following the defeat of Napoleon. In the Protocol of Troppau, the powers set forth their right to assist legitimate governments when threatened. This period of history was a period of revolution. Threats to the seated monarchies were such that the Alliance powers felt called upon to resist any growth of democratic spirit and proclaimed the authority to intervene on behalf of established monarchs. A circular dispatch from the courts of Austria, Prussia, and Russia in 1820 stated :

' The powers have exercised an uncontestable right in occupying themselves with taking in common measures of security against states in which the overthrow of government by a revolt, even could it be considered only as a dangerous example, must have for its consequences a hostile attitude against all constitutions and legitimate governments.²⁷

²⁵ HALL, *op. cit. supra* note 17, at 278.

²⁶ THOMAS AND THOMAS, *op. cit. supra* note 20, at 68.

²⁷ WESTLAKE, INTERNATIONAL LAW 305 (1904).

Based on their declaration, the members of the Holy Alliance intervened in Spain, Naples, and Piedmont in 1820 to suppress revolutions against the established governments. This policy of intervention caused England to break with the Alliance and Lord Castlereagh stated: "For nothing could be more injurious to the idea of government generally than the idea that their force was collectively to be prostituted to the support of established power without any consideration of the extent to which it was abused."²⁸

The United States reacted quickly to the claim to legitimizing intervention by the Holy Alliance. The threat to reestablish the Spanish sovereignty over the lost colonies in the Americas resulted in the enunciation of the Monroe Doctrine, which became a cornerstone of American foreign policy. Significantly, the Doctrine included the promise that the United States would forego intervention in European affairs.²⁹ The Monroe Doctrine was of a political character and not of a legal character. Many years later the Doctrine may have been given some quasi-legal status, internationally, by Article 21 of the Covenant of the League of Nations, which declared that the Covenant will not affect the validity of "regional understandings like the Monroe Doctrine. . . ." ³⁰

The general acceptance of the political principles of the Doctrine during the late 19th Century lead to an extension of the policy known as the Roosevelt Corollary. The United States declared that having denied European governments the right to intervene to protect their interests in the Americas, the United States was required to intervene when the orderly administration of government had broken down.³¹ Thus, from the beginning of the 20th Century, the United States policy in Latin America, particularly in the Caribbean area, was to act as the international policeman of the area with the "right" to intervene as the United States determined.

One of the more significant measures indicating United States policy was the Platt Amendment, which was incorporated in the treaty between the United States and the Republic of Cuba, signed at Havana, 22 May 1903 which stated in part :

That the government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and for discharging the obli-

²⁸ LOEWENSTEIN, *POLITICAL RECONSTRUCTION* 22-23 (1946).

²⁹ 5 HACKWORTH, *DIGEST OF INTERNATIONAL LAW*, at 435 (1940).

³⁰ See 1 OPPENHEIM, *op. cit. supra* note 16, at 316.

³¹ GRABER, *op. cit. supra* note 18, at 26.

gations with respect to Cuba imposed by the treaty of Paris on the United States, now to be assumed and undertaken by the government of Cuba.³²

Similar to the Platt Amendment was the provision in the Constitution of the Republic of Panama which gave the United States the right to intervene in any part of the Republic to reestablish public peace and constitutional order. The interventionist policy of the United States resulted in Marines being sent to Nicaragua, Haiti, the Dominican Republic, and Cuba during the early part of the 20th Century. The United States joined with other powers in the intervention in China in the Boxer Rebellion.³³ Forces under General Pershing were sent 186 miles into Mexico, fruitlessly chasing the outlaw Pancho Villa. Of this operation, Secretary of State Lansing declared :

The military operations now in contemplation by this Government will be scrupulously confined to the objects already announced, and that in no circumstances will they be suffered to trench in any degree upon the sovereignty of Mexico or develop into intervention of any kind in the internal affairs of our sister Republic.³⁴

United States foreign policy evidenced a free practice of intervention by the use of armed forces, as well as by diplomatic pressure, particularly by the manipulation of the recognition policy.

Largely as a result of these interventions the Latin American nations began to show displeasure at the ready intervention of the United States into the affairs of those republics on a unilateral determination of the United States Government. The State Department concern with Latin American abhorrence of intervention was reflected in the above quoted statement of Secretary Lansing denying any intent to intervene. The United States intervened in the affairs of other nations, at the same time issuing public denials.

After World War I, the United States made even more vehement denials of interventionist authority. The Department of State in 1930 specifically repudiated the Roosevelt Corollary, though emphasizing our essential interests in the Americas.³⁵

The advent of the administration of Franklin D. Roosevelt brought the complete denial of any right of intervention by the United States in the affairs of the nations of Latin America. At Montevideo in 1933 the United States accepted a nonintervention resolution with some reservations and in 1936 at Buenos Aires

³² HYDE, *op. cit. supra* note 23, at 57-58.

³³ GRABER, *op. cit. supra* note 18, at 183.

³⁴ HACKWORTH, *op. cit. supra* note 29, at 293.

³⁵ GRABER, *op. cit. supra* note 18, at 27.

signed a special protocol declaring intervention inadmissible, which protocol was ratified by the Senate without a dissenting vote.³⁶ During this same period, the United States abrogated the Platt Amendment and the treaty rights to intervene in Panama. Troops were withdrawn from the territory of the nations of the Caribbean, and the United States refused to send troops to Cuba when requested by that government. The new policy was consistently followed in the Spanish Rebellion when a circular instruction was sent out by Acting Secretary of State Phillips in 1936 which said in part:

... On the other hand, in conformity with the well established policy of non-interference with internal affairs in other countries, either in time of peace or in event of civil strife, this Government will, of course, scrupulously refrain from any interference in the unfortunate Spanish revolution.³⁷

It was after the more active participation of the United States in world affairs that a swing of the pendulum became apparent to some degree in the instructions of President Truman to General Marshall, as General Marshall departed for his mission to China in 1946 :

The U.S. Government has long subscribed to the principle that the management of internal affairs is the responsibility of the peoples of the sovereign nations. Events in this country [China] however, would indicate that a breach of peace anywhere in the world threatens the peace of the entire world.³⁸

As shall be shown subsequently, President Truman was to make the full swing in later events, but policy enunciations within the government die hard. As late as 1959 a press release of the Department of State said, "The policy of the United States with respect to the Cuban revolution has been strictly one of nonintervention in Cuban domestic affairs."³⁹

B. RIGHT OF REVOLUTION

An analysis of this rather contradictory policy of the United States may in part be rationalized on the conflicting interests of the nation. From its founding, the United States has supported

³⁶ *Id.* at 206.

³⁷ Jessup, *The Spanish Rebellion and International Law*, 15 FOREIGN AFFAIRS 260 (1937).

³⁸ TRUMAN, MEMOIRS 70 (1955).

³⁹ U. S. Dep't of State, *United States Explains Policy Toward Cuba*, 40 DEP'T STATE BULL. 162 (1959).

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the right of revolution. Those are not idle words in the Declaration of Independence which state that government derives its "just powers from the consent of the governed." In the foreign policy area, Thomas Jefferson, when Secretary of State, sent instructions to our minister in France saying:

We surely cannot deny to any nation the right whereon our own government is founded, that every one may govern itself according to whatever form it pleases, and to change these forms at its own will The will of the nation is the only thing essential to be regarded.⁴⁰

Captain Reynolds, in the lectures previously cited, referred to the American recognition of the right of revolution at the time when the United States Army was concerned with the Cuban insurrection of sixty years ago. This most basic of American policies was reaffirmed by Secretary of State Hughes, who said, "We recognize the right of revolution and we do not attempt to determine the internal concerns of other states."⁴¹ The application of this principle was followed by insistence on a policy of self-determination for all peoples after World War I and II. It was included by President Wilson in his Fourteen Points and by President Roosevelt in Article 3 of the Atlantic Charter.

Intervention in both definition and practice has no common pattern. The term is clearly not a word of art in international law. The term does not universally indicate the same concept. Indeed, the concept may vary depending upon the point in history or by geographical region. Equally variable has been the practice of States in regard to the use of intervention as a tool of foreign policy. The historical policy of the United States in regard to intervention has run a particularly irregular course. The United States practice of intervention or nonintervention has changed according to the period and environment of history and to the sector of the globe. The shifts in American policy toward intervention have been dependent on contemporary interests and not as a consequence of fundamental doctrine.

Only in the recognition of the right of a people to select and determine their own government has the United States policy been consistent. It is not solely a right of revolution which the United States cherishes but more basically it is a respect for the will of the governed which has been deemed essential.

⁴⁰ 1 MOORE, DIGEST OF INTERNATIONAL LAW 120 (1906).

⁴¹ HUGHES, OUR RELATIONS WITH NATIONS OF THE WESTERN HEMISPHERE 38 (1928).

111. INTERVENTION AND CUSTOMARY INTERNATIONAL LAW

It is to the writings and analyses of international lawyers that we now turn as the primary source for the international law of intervention. Having noted the difficulty of arriving at an agreed definition of the term in international law, and the fluctuating policies and practices of states, it should not be surprising to find there is no agreement on the lawfulness or morality of intervention.

Intervention began as a primitive method of international law enforcement, utilized by the great powers.⁴² The essence of intervention was force, or the threat of force, in case the dictates of the intervening powers were disregarded.⁴³ By its very nature, the action was abused and lead quickly to confusion over its purpose and authority. Most authorities begin with the positive statement that intervention is illegal and then proceed to define exceptions to the rule. The Thomases quote Kant in his *Essay on Perpetual Peace* that: "No state should interfere in the constitution or government of another state." But, the authors point out that Kant believed that this applied only to nations with a republican form of government. From this, the Thomases deduce that Kant would permit intervention to bring about the downfall of authoritarian government.⁴⁴ Loewenstein, writing after World War II, takes this same view and relates it to the necessity of intervening to destroy communist governments.⁴⁵

The confusion of the lawfulness of intervention is not clarified by Oppenheim, who wrote :

That intervention is, as a rule, forbidden by International Law, which protects the international personality of the States, there is no doubt. On the other hand, there is just as little doubt that this rule has exceptions, for there are interventions which take place by right, and there are others which, although they do not take place by right, are nevertheless permitted by International Law.⁴⁶

Lawrence notes that reference to state practices are no help. A state has acted on different principles on different occasions and he states, "On this subject history speaks with a medley of discordant voices, and the facts of international intercourse give no clue to the rules of international law."⁴⁷

⁴² GRABER, *op. cit. supra* note 18, at 13.

⁴³ LAWRENCE, *op. cit. supra* note 19, at 120.

⁴⁴ See THOMAS AND THOMAS, *op. cit. supra* note 20, at 7.

⁴⁵ See LOEWENSTEIN, *op. cit. supra* note 28, at 12.

⁴⁶ 1 OPPENHEIM, *op. cit. supra* note 16, at 305.

⁴⁷ LAWRENCE, *op. cit. supra* note 19, at 121.

All authorities seem to be agreed that basically it is not justified for one nation to interpose itself by force into the affairs of another nation and whether this is a violation of international law, or merely contrary to the principles by which sovereign nations operate within the community of nations, is not clear. Though bald, open dictation to another sovereign by force is clearly illegal, there are many exceptions which jurists have found authorized. Stowell, who wrote one of the more definitive works on the subject, constructs his entire volume⁴⁸ around the central theme of the right to intervene.

Customary international law relating to intervention is based upon two underlying principles. The first principle is the right of a nation to independence or the right of the peoples to self-determination.⁴⁹ Equally important has been the principle of the right of a nation to self-defense.⁵⁰ As the international environment changed within a particular era in history, the emphasis of these principles may have varied in making a legal determination of the authority to intervene.

A. PERMISSIBLE INTERVENTIONS

Like many of the writers, Hall recognized the difficulty in reaching a satisfactory answer to the question when he wrote :

It is unfortunate that publicists have not laid down broadly and un-animously that no intervention is legal, except for the purpose of self-preservation, unless a breach of the law as between states has taken place, or unless the whole body of civilized states have concurred in authorizing it.⁵¹

Even in his quest for a definitive rule, Hall accepts the necessity for proviso and exceptions.

The categories of exceptions to the prohibition against intervention under international law are based as often upon some moral justification for permitting intervention as upon any interpretation or extension of the principles involved. Stowell in his work appears to justify any basis for intervention which has a high moral purpose, including (1) humanitarian grounds, (2) religious perse-

⁴⁸ STOWELL, *INTERVENTION IN INTERNATIONAL LAW* (1921).

⁴⁹ "The perfect equality and entire independence of all distinct states is a fundamental principle of public law." KENT, *op. cit. supra* note 8, at 21.

⁵⁰ "Every nation has an undoubted right to provide for its own safety, and to take due precautions against distant as well as impending danger." *Id.* at 23.

⁵¹ HALL, *op. cit. supra* note 17, at 284.

cution, (3) oppression of a subject people, (4) uncivilized warfare, (5) denial of justice, (6) suppression of slave trade, (7) protection of foreign commerce, and (8) international police regulations.⁵²

A memorandum of the Solicitor of the Department of State listed innumerable occasions when the United States intervened with armed forces to protect citizens and property in foreign countries. The Solicitor reviewed many authorities on the right of a nation to give such protection to its citizens and property.⁵³ In this vein, Professor Hyde said the right of intervention exists:

... whenever within the territory of a foreign state there continue to exist conditions of disorder persistently and irreparably injurious to American life and property therein, and which the territorial sovereign lacks the power or disposition to abate.⁵⁴

Stowell distinguishes a further classification, which he labels supervision. He notes that this exception is not accepted international law but he postulates that a nation of first rank may supervise a near neighbor of second rank to keep order, for the failure to do so will result in international strife.⁵⁵ The exception of supervision might be likened to the authority of a State to put down a rebellion in a mandated territory. Some authorities also tend to look upon collective intervention as creating a fundamentally different situation involving the principle that an international community is more important than individual national independence.

B. RECOGNITION OF INSURGENCY AND BELLIGERENCY

In any study of the international law of intervention, as applied to civil strife, the laws as to insurgency and belligerency cannot be ignored. It was once believed that there were significant divisions of intensity in civil strife for which it was necessary to have precise definitions ranging from mob violence to rebellion, to insurgency, to revolution. Having precise categorizations as to the particular stage of a civil strife does not provide any guidance to the legal relationship of an outside power to the internal conflict. The need to identify the nature of the conflict was of more importance when the availability of small naval vessels permitted both the revolutionists and the legitimate government to employ these weapons and the international law relating to insurgency

⁵² See STOWELL, *INTERVENTION IN INTERNATIONAL LAW* (1921).

⁵³ See U. S. DEP'T OF STATE, *RIGHT TO PROTECT CITIZENS IN FOREIGN COUNTRIES BY LANDING FORCES* (3d ed. 1934).

⁵⁴ Hyde, *Intervention in Theory and Practice*, 4 ILL. L. REV. 15 (1911).

⁵⁵ STOWELL, op. cit. *supra* note 52, at 297.

and recognition of belligerency dealt essentially with the maritime law arising from a particular status. An acknowledgment of the state of insurgency might free the insurgents from the onus of piracy and perhaps grant them the advantages of the laws of war.⁵⁶ Such recognition of insurgency was an acknowledgment of facts as they existed.⁵⁷ It is to be noted that at the outset of civil strife, from the point of view of international law, only the established government has any international standing and insurgents, even after recognition, do not become subject to international law.⁵⁸ Admiral Powers says, "insurgency is a twilight zone in international law. . . ." ⁵⁹ The acknowledgement of the fact of insurgency by a State may well be an act of political intervention and serves only to give some vague legal status to the fact of a political revolt.

Of more importance to the legal status of the rebels, or insurgents, is a recognition of belligerency. Such recognition may be by the State in which the revolt is occurring or by an outside State. Since the end of World War 11, a period of much civil strife and revolt, there have been no instances of recognition of belligerency. It may be, as Wehberg says, this is because the present system of recognition does not satisfy modern requirements.⁶⁰ There is little to be gained by a major power in recognizing belligerency. By customary international law, the recognizing state must thereafter remain neutral in the conflict between the established government and the rebels or insurgents.⁶¹ Even in the Spanish Civil War, just prior to World War 11, there was a studied attempt by the great powers to resist a recognition of belligerency.

In the study of the legal aspects of intervention, the recognition of belligerency is important only as it creates a requirement of neutrality under international law. Recognition of belligerency by one State has no effect on the neutrality of another State.⁶² The recognition of belligerency does not even give the recognizing power the right of legation, though there may be informal discussions with the insurgents.⁶³ The view of the United States has con-

⁵⁶ JESSUP, A MODERN LAW OF NATIONS 53 (1952).

⁵⁷ TI-CHIANG CHEN, THE INTERNATIONAL LAW OF RECOGNITION 407 (1951).

⁵⁸ Wehberg, *The World Crisis, CIVIL WAR AND INTERNATIONAL LAW* 160, 165 (Longmans, Green and Co. 1938).

⁵⁹ Powers, *Insurgency and the Law of Nations*, 16 THE JAG JOURNAL 55 (1962).

⁶⁰ See Wehberg, *supra* note 58, at 166.

⁶¹ HYDE, *op. cit. supra* note 23, at 198.

⁶² TI-CHIANG CHEN, *op. cit. supra* note 57, at 382.

⁶³ 2 OPPENHEIM, *op. cit. supra* note 15, at 774.

sistently been that such recognition is a question of fact not to be decided by prejudices against or for either party. Hyde sets out a number of tests to be made by the third State in making its determination.⁶⁴ Fundamentally, however, recognition of belligerency is a question of political policy, though it is argued by some that the insurgents have a right to such recognition and third States are under a duty to declare such recognition.⁶⁵

C. INTERVENTION IN CIVIL STRIFE

The authorities are as divided on the right of a State to intervene in civil strife as they are on nearly all other aspects of the law relating to intervention. Garner is unequivocal :

There is no rule of international law which forbids the government of one state from rendering assistance to the established legitimate government of another state with a view of enabling it to suppress an insurrection against its authority.⁶⁶

This view was expressed as part of the argument that a recognition of insurgency does not change the international status of the insurgents so as to permit aid to the insurgents by a foreign state. Chen, who takes a quite different and more objective view of the status of insurgency, makes the argument that if a war exists it should be recognized and says :

The proper stand for a foreign State to take in case of domestic disturbance within another State can be none other than that of disinterestedness and nonintervention. It has no right either to aid or suppress the rebellion.⁶⁷

Garner and Chen were more concerned with the international rules of insurgency than upon the principles underlying the law concerning intervention. The preferred methodology in seeking out the law is to search for principles and so determine the rules of law. Clearly the law of intervention is in a state of confusion and there is a need to look for analogies but there are certain guidelines.

There is no question that international law recognizes the right of revolution.⁶⁸ There is no disagreement that civil strife is a domestic issue lying beyond the purview of international law, when

⁶⁴ See HYDE, *op. cit. supra* note 23, at 198.

⁶⁵ 2 OPPENHEIM, *op. cit. supra* note 15, at 249.

⁶⁶ Garner, *Questions of International Law in the Spanish Civil War*, 31 AM. J. INT'L L. 66, 67 (1937).

⁶⁷ TI-CHIANG CHEN, *op. cit. supra* note 57, at 335.

⁶⁸ HYDE, *op. cit. supra* note 23, at 253.

it can be isolated. There are, to be sure, more modern views that strife, or violence, anywhere in the world is of concern to the community of nations. Domestic wars in a modern world can easily cross international frontiers and present the danger of involving third States. So long as outside powers refrain from interposing themselves in such conflicts, the possibility exists that the conflict may remain domestic. But the conflict will be restricted only if *all* States are conscientiously neutral.

The classic rationale of those who would prohibit intervention even on the side of the legitimate government is made by Hall :

If intervention on the ground of mere friendship were allowed, it would be idle to speak seriously of the rights of independence. Supposing the intervention to be directed against the existing government, independence is violated by an attempt to prevent the regular organ of the state from managing the state affairs in its own way. Supposing it on the other hand to be directed against rebels, the fact that it has been necessary to call in foreign help is enough to show that the issue of the conflict would without it be uncertain, and consequently that there is a doubt as to which side would ultimately establish itself as the legal representative of the state. If again, intervention is based upon an opinion as to the merits of the question at issue, the intervening state takes upon itself to pass judgment in a matter which, having nothing to do with the relations of states, must be regarded as being for legal purposes beyond the range of its vision.⁶⁹

Those writers who accept Hall's thesis, and included among them is Stowell who found justification for so many types of intervention, base their view of the illegality of such intervention on the right of peoples to choose their own form of government, even though it be done by violence.⁷⁰ Quincy Wright says : "Since international law recognizes the right of revolution, it cannot permit other states to intervene to prevent it."⁷¹ Such a rationale applied as if it were an axiom ignores the fact that the change of governmental power by violence is never as accurate a guide to the national will as a change made by constitutional means. A change of government by force only makes evident which side has the strongest force. Violence and force are seldom gauges of the independence of judgment and self expression.

D. CONSENT TO INTERVENTION

Do those who would prohibit assistance to legitimate governments change their view if the foreign state intervenes with the

⁶⁹ HALL, *A TREATISE ON INTERNATIONAL LAW* 287 (6th ed. 1909).

⁷⁰ See STOWELL, *op. cit. supra* note 62, at 330.

⁷¹ Wright, *Subversive Intervention*, 54 *AM. J. INT'L L.* 521, 629 (1960).

consent of, or on the request of, the legitimate government? Does consent change the principle or vary the emphasis to be placed on the underlying rationale? Stowell notes that international society is dependent upon the cooperation of all states to preserve the existence of member states. The value of sustaining independent nations in the international community appears to justify the states, particularly the greater powers, in assisting sister states to suppress rebellion. Notwithstanding, Stowell declares that a request for aid is a declaration that the legitimate government does not have the capacity for **making** its authority respected and the government thereby gives up its sovereignty. When a state is no longer exercising its sovereignty, the reason for having its existence preserved no longer exists, so runs the **argument**.⁷² Such reasoning ignores the more practical view that a failure to have sufficient military force to cope with subversive conflict is not a reason to permit a state to be destroyed. The Thomases would seem to agree that request for aid by the legitimate government is an insufficient basis for intervention. Their approach would appear to be that a majority request is inadequate and that total consent of the state is required, when they say :

Consequently, there can be no legitimate grounds for foreign intervention unless both parties to the struggle request it; in such case the legality of the intervention would then be based upon the total consent of the state.⁷³

If, as those who see civil conflict only in black or white declare, intervention in civil conflict is prohibited, does total consent negate the principle? Clearly, those taking the view that foreign intervention in civil strife is improper will continue to argue that consent by only a part of the population is not sufficient. They will not admit that a request by the established government could represent the majority will of the nation overwhelmed by alien sources. What appears to be a somewhat more valid point is that made by Wright, who states that if a request were sufficient, each side would welcome foreign intervention from different powers and such requests would quickly lead to full scale international **war**.⁷⁴ While this may be true, the danger does not make both interventions unlawful.

Justification for intervention in civil strife on behalf of the established government has been found by the device of a prior

⁷² STOWELL, *op. cit. supra* note 52, at 331.

⁷³ THOMAS AND THOMAS, *NON-INTERVENTION, THE LAW AND ITS IMPORT IN THE AMERICAS* 215 (1956).

⁷⁴ See Wright, *The Prevention of Aggression*, 50 AM. J. INT'L L. 514, 529 (1956).

treaty of guarantee authorizing intervention. Such a bilateral agreement is actually a prior grant of consent but to justify intervention by treaty it must first be shown that the purpose of the treaty was legitimate. It may be argued that to give another nation the power by treaty to sustain a particular administration, or dynasty, is to grant to that other state the right to decide the form of government of the granting state. Such reasoning does not necessarily follow, for independence has been exercised in seeking to bolster internal self-defense by enlisting the aid of another power.

Even those who would, like Brierly, find a treaty right to intervene as a justifiable intervention,⁷⁵ would require that the consent to the treaty not be made under duress. International law does not, however, recognize that duress will invalidate a treaty, even though the law of most nations condemns contracts or agreements made under duress. At most, coerced consent would be suspect in the eyes of the world.⁷⁶ The implications of possible coercion may well have been one of the reasons for the American decision to abrogate the Platt Amendment and other treaty rights to intervene in Latin America. These rights, if not secured under duress, were at least not independent expressions of sovereignty by the granting states. But the abrogation was a policy decision and not necessarily a legal one. As Miss Graber points out, there is the further danger that within the government of a smaller nation those in authority would be quite willing to grant away sovereignty by treaty if they could be assured that the United States would come to their aid to keep them in power. Such a political act might not represent the public will and granting away of sovereignty under such circumstances would be immoral, at the very least.⁷⁷

E. SELF-DEFENSE

Hyde expounds, as valid, one exception to the denial of authority to intervene by virtue of a treaty of guarantee. He declares that intervention may be excusable, if the intervening power is adjacent to the territory of the hostilities.⁷⁸ The basis for this authority is the principle of self-defense. It has been recognized since the *Camline Case* that a state could, as a matter of self-defense, suppress

⁷⁵ See BRIERLY, *THE LAW OF NATIONS* 308 (5th ed. 1955).

⁷⁶ GRABER, *CRISIS DIPLOMACY, A HISTORY OF U. S. INTERVENTION POLICIES AND PRACTICES* 143 (1959).

⁷⁷ *Id.* at 144.

⁷⁸ See HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 253 (1951).

armed bands lurking in a neighboring state.⁷⁹ The reverse of this rationale may be argued to justify intervention to defend one's nation from conflict arising across the immediate border. The Thomases justify the many interventions of the United States in the Caribbean on the basis of self-defense in the nature of long range strategical necessity.⁸⁰ In the modern missile world, the requirement of legitimate defense interests are not limited to adjacent or contiguous territory.

F. COUNTER-INTERVENTION

A further justification for intervention, noted by a number of authorities, is intervention as a sanction for the violation of international law.⁸¹ An extension of this rule is the permissible intervention by armed forces of a foreign state in a civil strife, or insurrection, as a consequence of illegal intervention by a third state. The justification for counter-intervention arises out of the authority to use sanctions to prevent an illegal act in international law. The only effective enforcement authority at this stage of development in the international community is a state. If the doctrine of nonintervention is valid and is to be successful, it must be consented to by the despots as well as by the free states. Unless nonintervention is universally accepted "the wrong side may help the wrong side but the right must not help the right."⁸² It becomes necessary to permit a form of nonintervention by intervention. The Thomases cite, as an example, the intervention of the United States in Mexico at the time of the ill-fated reign of Maximillian and Carlotta in the mid-nineteenth century. It is to be remembered that the intervention of the United States was ineffectual and raised few international problems because of the more consuming interest of the United States in its own civil war. The Thomases express the view that "counter-intervention by a third state to terminate the illegal intervention is another matter, for here there is a breach of the law."⁸³ In Hyde's discussion of counter-intervention, he refers to the address by President Roosevelt in 1937 when the President spoke in terms which are approx-

⁷⁹ Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82 (1938).

⁸⁰ See THOMAS AND THOMAS, *op. cit. supra* note 73, at 83.

⁸¹ 1 OPPENHEIM, INTERNATIONAL LAW (8th ed., Lauterpacht ed. 1955); 2 OPPENHEIM, INTERNATIONAL LAW 559 (7th ed., Lauterpacht ed. 1952). See also GRABER, *op. cit. supra* note 76, at 30.

⁸² Gardner, *The United Nations: Asset or Liability?*, 48 A.B.A.J. 811, 814 (1962).

⁸³ THOMAS AND THOMAS, *op. cit. supra* note 73, at 404-05.

pritate today: “. . . nations are fomenting and taking sides in civil warfare in nations that have never done them any harm. Nations claiming freedom for themselves deny it to **others**.”⁸⁴ Hyde then continues: “To prevent the illegal interference by one State with, the political independence of another, a third State may doubtless in principle lawfully intervene, even though its own safety is not endangered by the action to which it is **opposed**.”⁸⁵

The counter-intervention theory is directly applicable to the situation in the world today. The communists have supported rebel forces with aid, advice, and sanctuary. The communists have announced that this is the Marxist policy. It is a policy of unlawful and prohibited intervention in the domestic matters of other states and an intervention with which many of these states are unable to cope alone.

It is clear that sanctioning counter-intervention may well be a dangerous course and a force toward escalating a civil conflict into an international conflict. If it is true, as Sigmund Neumann believes, that the revolutions of the world today are international in scope and that without outside aid no revolution could succeed in today's world, counter-intervention could well be catastrophic in the nuclear age.⁸⁶

G. SOVIET VIEW

The Marxist-Leninist viewpoint is of interest not for the principles of law which may be developed but for their application to specific situations. During the rebellion in Indo-China against the French, the Soviets took the position that it could aid Ho Chi Minh because he was the *de jure* and *de facto* government of a state called Vietminh.⁸⁷ In typical Soviet reasoning, they were helping a lawful government to put down an illegal **insurrection**.⁸⁸ This type of argument is reminiscent of the German and Italian approach to their assistance to Franco in the Spanish rebellion. The two Axis powers, during that conflict, granted recognition to the rebel government of Franco so as to “legalize” their assistance

⁸⁴ HYDE, *op. cit. supra* note 78, at 247.

⁸⁵ *Ibid.*

⁸⁶ See Neumann, *The International Civil War*, 1 WORLD POLITICS 333 (1949).

⁸⁷ “. . . a grave violation of customary diplomatic procedure; for it was recognition of a rebel government fighting against France, with which Russia had a treaty of friendship.” Woolsey, *The United States and Indo-China*, 48 AM. J. INT'L L. 276,278 (1954).

⁸⁸ THOMAS AND THOMAS, *op. cit. supra* note 73, at 232.

to that government. The Chinese communists take a somewhat different approach. At the time of the Indian attack on Goa, spokesmen in Hanoi said, "If India could attack Goa, why could not the Vietnamese use arms against American colonialists? What is happening in South Vietnam is not subversion but a people's war of independence." Peiping spokesmen added that North Vietnam was "perfectly justified" in supporting attempts by guerrillas to overthrow the South Vietnam government.⁸⁹ The communist approach, then, is consistently to determine the "justness" of the conflict by their own lights and then to declare any participation on the side they consider the more just as legal.⁹⁰

H. SUMMARY OF CUSTOMARY INTERNATIONAL LAW

Ignoring the primitive view of the communists that intervention is authorized when a nation finds the cause is just, there emerges from a study of customary international law a body of rules to judge intervention. Notwithstanding the lack of unanimity of viewpoint and the lack of clarity, certain principles and guidelines can be found against which to judge the legality of United States assistance by armed forces to nations fighting insurgents under customary international law.

Intervention is not *per se* unlawful. What is unlawful is the interposition of a nation's will upon another nation by a threat of force. The principles upon which the body of law is based are two: the principle of national independence and the principle of the right to defend that independence. There clearly exist several categories of intervention which are permissible based on humanitarian reasons or upon the right to protect a nation's own citizens and property.

The principles behind the law of intervention are equally applicable when the inquiry involves intervention in civil strife. The basic criterion remains that intervention is improper when it subverts the independence of another nation. When authorities are in dispute over the lawfulness of intervention, it is because these authorities view differently the people's will as related to the right

⁸⁹ *Subversion Laid to North Viet Nam*, The New York Times, May 26, 1962, p. 1, col. 2, at p. 2, col. 3.

⁹⁰ "Guerrilla warfare is and remains one of the regular forms of the people, that is, just war and in this sense it is included in the collection of rules of international law directed to the prevention of any kind of aggression." Trainen [Soviet Jurist] *Questions of Guerrilla Warfare in the Law of War*, 40 AM. J. INT'L L. 534, 559 (1946).

of intervention. Certain writers have become so imbued with the importance of the label of the right of revolution that they mistakenly view any revolt as a suitable vehicle for judging the will of the people. These authorities tend to misconstrue consent in a similar fashion, by saying that a plea for foreign assistance, *ipso facto*, means the legitimate government no longer represents the will of the people. An interpretation that a request for aid equates to a determination that the majority is not supporting the established government is to substitute a rule for judgment.

If intervention is to counter an illegal interference by a third state, the act of intervention is in support of the rule of international law. Until all states recognize the rule of law, there must be a right to enforce international law and if it can be accomplished by counter-intervention, it is not unlawful. The danger of this course is in its possibility of escalating the civil war into an international conflict. This possibility does not, however, bear on the question of the lawfulness of the counter-intervention but only on the danger faced by embarking on such a policy.

The analysis of customary international law of intervention as expressed by the leading scholars of the subject has been developed from their interpretations of historical situations. Customary law does not forbid an act of intervention if it does not violate the principles upon which the rules were conceived. Before proceeding to determine whether the current effort of the United States to assist in counterinsurgency operations is lawful, an analysis of American commitments to international organizations must be undertaken. When this has been done, the pattern of United States policy may be compared to the total law to ascertain its lawfulness.

IV. COLLECTIVE INTERVENTION

The customary rules of international law, heretofore discussed, were deduced by scholars of international law based on the historical examples available to them. Within the past two decades a new force in foreign relations has come upon the scene. These are the international organizations dedicated, at least partially, to the use of collective action in the world. No study of the international law of intervention is complete without a study of the international agreements upon which these organizations were founded. This study will provide a further source of law which we must use to resolve our legal problem.

Does the fact that a number of nations act collectively to intervene in a rebellion or civil conflict affect the principles of international law relating to such intervention? Does membership in an international organization inhibit the member nations in their individual right to intervene in such conflicts? The body of law relating to intervention in civil strife arose during a period in history when intervention was by one major power within its sphere of influence.⁹¹ Whatever the rules, particularly during the nineteenth century, the major powers did intervene often and the writers sought to understand such intervention and classify the actions. Even before the establishment of international organizations for collective security there were expressions of the view that action taken by or in the name of the whole international community might conceivably be more moral and justified and consequently more lawful than if accomplished unilaterally.

It has never been disputed that rebellions or insurrections are domestic matters outside the interest of international law. The community of nations had no right to interfere.⁹² Nonetheless it has been observed that such domestic matters could easily become international in scope as the hostilities crossed international boundaries. By 1938, when the Spanish Rebellion with its tremendous international implications burst upon the world, writers were beginning to deny the argument that collective intervention in civil wars was too visionary.⁹³ World events since 1945 and the lessons learned are summarized by Greenspan :

... international law is showing an increased interest in the problem of civil and colonial war, because experience has demonstrated especially in recent years, that such wars may gravely threaten international peace and security, and may contain the seeds of international conflict of calamitous dimensions.⁹⁴

Does collective action change the basic principles used to determine the law of intervention? Does the force of numbers give a group of states a greater right to intervene than might be given an individual state? When intervention is an attack on the right of self-determination or independence its unlawfulness remains clear. It may be granted that collective action is perhaps more unselfish and thus proceeds on a firmer basis but collective action

⁹¹ Fenwick, *Intervention: Individual and Collective*, 39 AM. J. INT'L L. 645, 646 (1945).

⁹² Fenwick, *Can Civil Wars Be Brought Under the Control of International Law*, 32 AM. J. INT'L L. 538, 539 (1938).

⁹³ See *ibid.*

⁹⁴ GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 621 (1959).

does not place upon the intervention an automatic stamp of legality. In the absence of some violation of international law, there is no call for the law enforcing authority of the community of nations to be exercised. The Thomases find only one exception to the denial of any right of collective intervention in civil strife: "The community of nations . . . may not collectively intervene in the civil strife with the sole possible exception of a request to intervene by both of the contending parties. Such intervention would then be based upon the total consent of the state."⁹⁵ Dissatisfaction with the inability of the international community to cope with civil conflicts, which continually threaten to ignite international conflagration, became the basis for a search for authority under international law for collective action.

What has been the world's experience with collective action? A review of international action and of the multilateral treaties during the Spanish Rebellion and of the Organization of American States and the United Nations must be made.

A. SPANISH REBELLION

The first experience the world had in action by the international community was in the Spanish Rebellion prior to World War II. Collective action was not taken under the auspices of any international organization or authority. Indeed, the nations involved were members of the League of Nations but the League was avoided and ignored while decisions and actions were taken by the European community without reference to any prior treaty arrangement. The matter was referred to the League by the established Spanish government, but the major powers, having taken their position outside the League, found no reason to insinuate that body into the picture. Even Premier Negrin, in his appeal to the League in 1937, could not find that the civil war was a matter within the jurisdiction of the League of Nations. Rather, he sought the intervention of the organized international community based on the fact that this civil strife had become an international war of invasion, overshadowing the civil war, and was therefore, of interest and concern to the League.⁹⁶

Why did the great powers seek collective action in the Spanish Rebellion? The events must be placed in their environment during

⁹⁵ THOMAS AND THOMAS, *op. cit. supra* note 73, at 221.

⁹⁶ PADELFORD, *INTERNATIONAL LAW AND DIPLOMACY IN THE SPANISH CIVIL STRIFE* 133 (1939).

the period of aggressive international totalitarianism by the Fascist powers. In his comprehensive review of the Spanish Civil War, Norman Padelford set the stage when he wrote:

European civil wars were connected with the international struggle for predominant power on the continent, making it difficult for any great Power to stand aside while another or another combination of Powers obtained control of possession of a state torn by civil strife, thus upsetting the balance of power.⁹⁷

Precedent for the Non-Intervention System could be found in an unwritten and informal international accord during the civil war in Spain in 1873 when the British and French undertook a similar approach in fear of intervention by other powers.

The anomaly of the action is that it was termed a Non-Intervention System perhaps proving once again the statement attributed to Talleyrand that nonintervention is "a mysterious word that signifies roughly the same thing as **intervention**."⁹⁸ The Non-Intervention System was a unique international institution based upon an exchange of notes between twenty-seven European governments whereby each unilaterally declared its intention of preventing shipment of arms, ammunition, and implements of war from its territory to either party in the rebellion. The System could have been considered a recognition of belligerency but the powers never specifically made a declaration of such recognition. The exchange of notes set up a complicated and complex system with a secretariat, a Non-Intervention Committee, inspection, naval patrols, observers, prohibited commodities, and procedural rules. Despite the well constructed plans the arrangement simply fell apart when the Germans and Italians ignored their commitments and actively intervened with men and materiel on the side of Franco. The System failed and the Non-Intervention Committee never formally disbanded but simply ceased to operate. In the face of the international agreements, the aid furnished by Italy and Germany to the rebels was intervention, unjustified by self-preservation, protection of nations, or any other reason.⁹⁹ The failure of the System was evidence that the Spanish Civil War was "intimately related to the continental struggle between communism, fascism and **democracy**."¹⁰⁰ The Non-Intervention Sys-

⁹⁷ *Ibid.*

⁹⁸ Talleyrand as quoted in MODELSKI, *THE INTERNATIONAL RELATIONS OF INTERNAL WAR* 9 (1961).

⁹⁹ Garner, *supra* note 66, at 70.

¹⁰⁰ PADELFORD, *op. cit.* *supra* note 96, at 201.

tem was a success only in preventing hostilities from being extended to other territories.

In the analysis of the international law involved in the Spanish Civil War, Wehberg wrote :

In the event of an international conflict, no one would consider it sufficient merely to apply the principles accepted in theory and in practice a generation ago for safeguarding international peace; but in discussing the burning question of the Spanish Civil War almost the only principles one can fall back on, apart from a certain number of precedents, are those enunciated about the beginning of the century, about a generation ago It is true that traditional international law contains several rules concerning civil war which are still worthy of respect, but many of its principles must be considered out of date.¹⁰¹

The experience of the international community in the Spanish Rebellion demonstrates that not only were the rules of international law relating to unilateral intervention in civil strife unclear but the international community had shown that it was not ready to substitute effective collective action to resolve the problem. There was recognition of the international dangers involved and the fact that civil strife was part of the international political struggle.

B. ORGANIZATION OF AMERICAN STATES

It should be expected that any organization of states of the Western Hemisphere would include, as a fundamental principle, a prohibition against unilateral intervention. The principle of nonintervention had so engrossed the smaller nations of the region for so many years that it had practically become the foundation stone of their approach to international law. These nations viewed intervention generally as somehow unlawful. The Latin American republics have continued to determine their hemisphere policy on their antipathy to intervention, which they view not in the light of today, but as to what took place in the period up to the mid-twenties. Moreover, their concern was directed toward intervention by the United States and not toward possible intervention by other Latin nations or outside powers. Any question of collective intervention by these powers must be considered against this background. Both Dr. Calvo and Dr. Drago of Argentina sought repeatedly, at international conferences of American

¹⁰¹ Wehberg, *supra* note 58, at 161.

jurists and diplomats, to secure acceptance of a flat rule prohibiting intervention.¹⁰²

As early as the Havana conference in 1928 the changing position of the United States to the question of intervention could be foreseen. Although the United States refused to accept the principle of nonintervention, the method of refusal foretold the eventual acceptance which took place at Montivideo in 1933, when the Good Neighbor policy was coming to full flower. The meaning of the nonintervention principle in the eyes of the Latin American states may be found in the "Convention on Duties and Rights of States in the Event of Civil Strife," which was adopted in Havana in 1928. That convention placed restrictions only on aid to insurgents and specifically excepted aid "when intended for the Government" unless a status of belligerency had been recognized.¹⁰³ It is clear that the principle of nonintervention did not apply even then to assistance to the established governments.

The rule of nonintervention in its application was absolute. The overriding concern with this principle of nonintervention may be found in its renewal, in one form or another, at every conference of Latin American States continuing to the meeting at Punta del Este in January 1962. At that meeting the approach became a little more sophisticated when the Ministers of Foreign Affairs proclaimed: "The principle of non-intervention and the rights of peoples to organize their way of life freely in the political, economic, and cultural spheres, expressing their will through free elections, without foreign interference."¹⁰⁴

Notwithstanding the historical antipathy to intervention, the American republics have a short history of collective intervention. The first hint of the authority for collective intervention came from the Convention on Provisional Administration of European Colonies and Possessions in the Americas, which was signed in Havana in 1940. During World War II, the American States established a program to fight subversion within the Hemisphere. There was no initial question of intervention, because inquiries made, were made with the consent of the individual governments.

¹⁰² THOMAS AND THOMAS, *op. cit. supra* note 73, at 61.

¹⁰³ *Convention Regarding the Duties and Rights of States in the Event of Civil Strife*, 1 PAPERS RELATING TO FOREIGN RELATIONS OF THE UNITED STATES, 1928, at 612 (U. S. Dep't of State 1942).

¹⁰⁴ Official Report, *Eighth Meeting of Consultation of Ministers of Foreign Affairs Serving as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance*, 56 AM. J. INT'L L. 605 (1962).

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It was not until a change in government in Bolivia and in Argentina, in 1943, that the American republics agreed not to recognize such changes in government prior to an exchange of information between the republics concerning the circumstances of the establishment of the new government. After investigation and exchange of information, nineteen of the states refused to recognize the new governments. This was not collective action but it was joint action, even though each state took individual responsibility.¹⁰⁵

The meager beginnings of the affirmation of collective action on the part of the American States is to be found in the Act of Chapultepec, agreed to in Mexico City in 1945. Concerning the Act of Chapultepec Fenwick says :

... it recognizes in respect to the fundamental right of self-defense that the only practical condition upon which the individual state can be denied the right to take the law into its own hands is that the community as a whole must be prepared to take action in its own name.¹⁰⁶

Nonetheless, the nonintervention principles were again reaffirmed in Article 15 of the Charter of the Organization of American States signed at Bogota in 1948. That Article provides:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.

This Article must be interpreted, however, in the light of Article 19: "Measures adopted for the maintenance of peace and security in accordance with existing treaties do not constitute a violation of the principles set forth in Article 15" ¹⁰⁷

The continued reaffirmation of the principle of nonintervention by the nations of the Americas certainly places some limitation on the right of individual nations to assist even the legitimate government faced with insurrection. The region looks to the Organization of American States and that body will take action only if the peace and security of the hemisphere is at stake. In this connection, the view of the Thomases is :

Accordingly, in the event of civil strife the OAS has no power to act unless the civil strife contains factors which endanger the peace of the

¹⁰⁵ Fenwick, *supra* note 91, at 658-660.

¹⁰⁶ *Id.* at 662.

¹⁰⁷ *Charter of the Organization of American States*, TREATIES AND OTHER INTERNATIONAL ACTS SERIES 2361 (U.S.G.P. 948).

Americas, and such factors would have to be of such a nature which threatened the inviolability of the integrity or the sovereignty or political independence of any American states.¹⁰⁸

It was under such circumstances in the late forties and early fifties that the Organization took cognizance of the activities of the Caribbean League involving charges and counter-charges of the threat to the nations of Central America and the Caribbean. While nothing was done in a positive manner to reduce the threat to regional peace by the insurrectionists based across borders ready for attack, the OAS Council did ask that the governments abstain from hostile acts and prevent terrorist activities on their territory. OAS action was, at least, a recognition of the necessity for collective action.

C. UNITED NATIONS

The existence of the United Nations presents two problems relative to the right of member nations to intervene with armed forces to assist other nations, either members or nonmembers, in countering insurrection or revolt. First, may the United Nations, acting through the member nations, intervene in such civil conflict? Second, do the existence of the United Nations and the provisions of the Charter of that international organization inhibit unilateral intervention by member nations?

The relationship of the Organization itself to civil disputes within nations, either members or nonmembers, is first confronted with the provisions of Article 2(7):

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following principles.

. . . . 7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Inherent in this Article is the recognition of the right of a member or state to take the action required to suppress a revolt.¹⁰⁹ This would be true even without reference to Article 51:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a

¹⁰⁸ THOMAS AND THOMAS, *op. cit.* *supra* note 73, at 236.

¹⁰⁹ 2 OPPENHEIM, *op. cit.* *supra* note 81, at 153.

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member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.

There are grounds for arguing that Article 51 is speaking only in terms of an armed attack from without. The sense of Chapter VII of the Charter would appear to concern itself only with the problem of maintaining international peace or of a conflict endangering the peace and security internationally rather than intranationally.

Professor Claude has addressed himself to this problem as follows :

The Charter undertakes to inhibit the use of force in international relations, but it does not address itself with equal clarity to the problem of organized violence within the territory of a state. In principle, it commits the United Nations to the maintenance of international peace, leaving the internal affairs of member states to national management Thus, it may be suggested that the Charter concentrates on the problem of international war, ignoring the issue of civil war except in cases where domestic strife appears likely to develop significant international ramifications. The Charter's concern with war among states is absolute; its concern with war within states is conditional.¹¹⁰

The problem is one of determining whether the civil conflict within a nation is of such a nature that it involves a breach of the peace and is a threat to international security. If not, the United Nations would have no jurisdiction in the matter. And even if it were clear that the conflict did involve international security, the state would have authority to defend itself either alone or in company with others as a part of the right of collective security until such time as the security Council did take action. In connection with this problem of a determination of when a breach of the peace occurs, Quincy Wright says it "exists whenever hostilities occur between armed forces controlled by governments *de facto* or *de jure* at opposite sides of an international recognized frontier."¹¹¹ Such a definition can be interpreted to include resistance of armed bands of insurgents entering the nation from the territory of a contiguous state. Thus, civil strife even without the intervention of foreign powers could constitute a breach of the peace if the conflict is of such intensity that it would be recognized as a state of belligerency.

On one occasion, at least, when there was no reason for the Russian representative to have a bias on the question, the Russians

¹¹⁰ Claude, *The United Nations and the Use of Force*, International Conciliation, March 1961, pp. 325, 326.

¹¹¹ Wright, *supra* note 74, at 515.

have considered civil conflicts as falling within the Charter. General Slavin, during the debates leading to the Geneva Conventions stated :

. . . Since the creation of the organization of the United Nations, this question seemed settled. Article 2 of the Charter provided that Member States must ensure peace and world security. They could therefore not be indifferent to the cessation of hostilities, no matter the character or localization of the conflict. Colonial and civil wars therefore come within the purview of international law.¹¹²

Professor Jessup agreed that the Security Council could find a civil conflict as a "threat to the peace" under Article 39 and take appropriate steps under the Charter.¹¹³ The Thomases are in apparent conflict with this view when they say, "The Charter does not contemplate collective action in a civil war within a state to maintain or restore the internal peace of that state." They proceed, however, to say that if such internal conflict is a threat to international peace then collective intervention would be proper based upon a theory of "prior consent" to such intervention.¹¹⁴ If prior consent is granted by signing the Charter, seemingly intervention by nonmembers states is precluded.

As to the authority of the Charter in the domestic area, M. S. Rajan, in his work on this subject, points out that John Foster Dulles as one of the authors of the article on domestic jurisdiction stated at San Francisco that the nonintervention clause relating to domestic jurisdiction was a broad principle subject to evolution. Rajan notes that this clause is controversial because of "indifferent drafting, diffuse meaning and the discussion thereon was unreal for the purpose of interpretation."¹¹⁵ The record of the United Nations in its various organs on the problem of domestic jurisdiction has not been a restrictive one. From the earliest measures brought before the United Nations there has been little hesitancy to consider problems which might have been avoided by a strict application to the domestic jurisdiction provisions. The Organization considered the Greek conflict, domestic though it appeared, justifying UN action by virtue of the border disputes with Yugoslavia and Bulgaria. The Security Council considered the Indonesia question despite the objection of The Netherlands that the matter was a domestic question.

¹¹² 2B FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949 14 (Swiss Federal Political Dep't 1949).

¹¹³ See JESSUP, A MODERN LAW OF NATIONS 54 (1952).

¹¹⁴ See THOMAS AND THOMAS, *op. cit. supra* note 73, at 225.

¹¹⁵ RAJAN, UNITED NATIONS AND DOMESTIC JURISDICTION 42 (1958).

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The views of the Assembly were expressed in the resolution adopted on 17 November 1950: "Whatever the weapons used, any aggression whether committed openly or by fomenting strife in the interest of a foreign Power, or otherwise is the gravest of all crimes against peace and security throughout the world."¹¹⁶ Ambassador Lodge expressed the United States view when he said, "If the United Nations cannot deal with indirect aggression, the United Nations will break up."¹¹⁷

The experience of the United Nations in the Congo demonstrates the evolution of the Charter. The original appeal to the United States was declined and President Eisenhower advised the Congolese leaders that American assistance would have to be through the United Nations.¹¹⁸ Although it may be argued that the United Nations originally entered upon its Congo adventure based upon the threat to international peace by the failure of Belgium to observe the Treaty of Friendship, the secessionist problems created by Katanga soon began to engage the attention of the international body and the Congo accepted UN intervention on UN terms. The Secretary General originally declared that the UN would not be entitled to "take any action which would make them a party to internal conflicts in the country."¹¹⁹ Despite the best of intentions by the Secretary General and the organs of the United Nations, subsequent events have clearly projected the organization, particularly the Secretariat, into the internal conflict of the Congo, to include the use of military force. Although written before the Congo operation, the views of Rajan are significant:

It is quite clear from these actions in cases in which objections on the grounds of domestic jurisdiction were vigorously raised that both the principal organs of the United Nations, which are empowered to recommend peaceful adjustment of situations of lesser gravity than threat to peace, breaches of peace and actions of aggression dealt with in Chapter VII of the Charter, have done so without any apparent inhibition by reason of the general rule stated in the first part of Article 2(7).¹²⁰

The foregoing analysis of three efforts at collective action by the community of nations does not evidence any change in the

¹¹⁶ Resolution 380, Fifth Session, see YEARBOOK OF THE UNITED NATIONS 150, at 203 (U.N. Pub. Sales No. 1951.1.24).

¹¹⁷ U. S. Dep't of State, *The Lebanese Complaint in the Security Council*, 39 DEP'T STATE BULL. 196 (1968).

¹¹⁸ Gardner, *supra* note 82, at 813.

¹¹⁹ Miller, *Legal Aspects of the United Nations Action in the Congo*, 56 AM. J. INT'L L. 11 (1961).

¹²⁰ RAJAN, *op. cit. supra* note 115, at 360.

principles upon which the law of intervention is based. On the contrary, the international effort has been to emphasize these principles of national independence and self-defense. In fact, the organizations have accepted these principles as foundation stones of their own existence.

Does membership in an international organization inhibit the member nations in their individual right to intervene in civil conflicts? The answer to this question is not so unequivocal. Should the United Nations or the Organization of American States preempt the area, unilateral aid by a member nation to the established government under attack would be not only redundant but improper and contrary to the Charter. Certainly either organization has jurisdiction to intervene even in civil conflicts if a threat to international peace is judged to exist. In the more likely situation that the UN or OAS may fail to act, assistance must come from individual member states. The Charters recognize the right of individual and collective self-defense. The customary rules of international law *vis-a-vis* intervention have not become more restrictive by any nonintervention policies written into the Charters when the organizations fail to act. When the international bodies do act, the members are thereafter precluded from taking unilateral action.

V. COUNTERINSURGENCY SINCE WORLD WAR II

To reach any conclusion as to the lawfulness of a particular foreign policy, it is first well to relate the act to a legal concept. In this article the act of offering assistance by military force to nations fighting insurgents was by historical survey found to be a form of intervention. The first source of the law of intervention is customary law taken from the analyses and expression of jurists and writers of authority in the law. Their views are based on the custom and historical experience of the past two centuries. This customary law then must be related to other sources of international law which, in this case, are the multinational organizations, of which the United States is a member. From these sources of international law, general rules and principles have been established. It is then necessary to ascertain the specific facts of the policy to be judged and measure these facts against the rules to determine the legality of the policy under consideration.

The facts of the policy of assistance to other nations combating insurgents must be analyzed. It is therefore appropriate to ex-

amine three examples of assistance to foreign governments engaged in civil conflicts—Greece, Lebanon, and Hungary.

A. GREECE

The first significant civil conflict with international implications following World War II was that which took place in Greece. In truth, the conflict in Greece began during World War II when the communist partisan Army, ELAS, began to vie for control in postwar Greece. Communists in all nations occupied by the Axis powers carried on the same program of preparation for wars of liberation. The Greek effort was the first to come to fruition. All those nations whose governments were disrupted by World War II were to “find themselves unhappily placed in the frontline of a revolutionary contest.”¹²¹

Greece particularly fits the pattern of a country ripe for the attention of the communist world and an attempt to gain control of the Government. Greece stood as a buffer nation between the Soviet homeland and another part of the communist empire, Albania. The borders of Greece on Yugoslavia, Albania, and Bulgaria provided a haven for the communist armed bands. The neighboring communist controlled countries not only provided a haven but actively supported such armed bands. Greece complained to the United Nations that these armed bands had been instigated as part of a general political conspiracy.¹²² From the second through the fifth sessions of the General Assembly the problem of guerrillas operating across the borders of Greece was raised but no effective action was taken by the United Nations.¹²³

Before the end of the war, it was British troops in Greece that maintained a noncommunist government there. British assistance to Greece continued until February 1947. At that time the British informed the United States that they could no longer support Greece as the financial burden was too great and British troops would be removed, and Greece requested aid of the United States.¹²⁴ From this came the development and enunciation of the Truman Doctrine toward Greece and Turkey. This policy, as announced by President Truman, declared :

¹²¹ MODELSKI, *THE INTERNATIONAL RELATIONS OF INTERNAL WAR* 20 (1961).

¹²² See *YEARBOOK OF THE UNITED NATIONS*, 1947-48, at 337-52 (U.N. Pub. Sales No. 1949.1.13).

¹²³ See *YEARBOOK OF THE UNITED NATIONS*, 1950, at 373-81 (U.N. Pub. Sales No. 11951.1.24).

¹²⁴ GRABER, *op. cit. supra* note 76, at 269.

I believe that it must be the policy of the United States to support peoples who are resisting attempted subjugation by armed minorities or by outside pressure. I believe that we must assist free peoples to work out their own destinies in their own way. I believe that our help should be primarily through economic and financial aid which is essential to economic stability and orderly political processes.¹²⁵

This declaration accompanied a request to the Congress for an initial outlay of \$400,000,000 to assist in resisting aggression. To counter charges of illegal American intervention, the United States argued it had the right to assist the legitimate governments in fights against illegal intervention by three neighbors. Recourse to the United Nations was impractical because "The United Nations . . . are not in a position to extend help of the kind that is required."¹²⁶ Economic aid was accompanied by military assistance and advice. The economic buildup of Greece and military assistance plus the defection of Yugoslavia from the communist bloc resulted in the stabilization of the government of Greece and its maintenance within the community of free nations. It is noteworthy that during the whole period, the British maintained a force of 3,000 men in Salonika who took no part in the guerrilla warfare but served as a stabilizing influence.

B. LEBANON

A different situation was presented by the landing of troops in Lebanon in implementation of the Eisenhower (now American) Doctrine in 1958. During the previous year the Congress had granted the President formal authority to commit economic and military aid to the countries of the Near and Middle East. Even at that time the United States was careful to seek to avoid the charge of intervention by stating that aid would go only to those nations requesting such aid and that American troops would not be used if a country succumbed to communism due to internal subversion.¹²⁷ At the time, the United States refused a Russian suggestion for setting up a concert of great powers "to arrogate to themselves decisions on matters of vital importance to the nations of the Middle East," because the U. S. policy of non-intervention was inconsistent with such an approach.¹²⁸

¹²⁵ *Aid to Greece and Turkey*, Address by President Truman to Joint Session of Congress, March 12, 1947.

¹²⁶ GRABER, *op. cit. supra* note 76, at 270.

¹²⁷ *Id.* at 292.

¹²⁸ U. S. Dep't of State, *United States Replies to Soviet Proposals for Declaration on Middle East*, 36 DEP'T STATE BULL. 523 (1957).

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On the 11th of May, 1958, President Chamoun of Lebanon advised Ambassador McClintock that he might ask for assistance of United States armed forces. The Ambassador told President Chamoun that United States aid could not be invoked unless the integrity of Lebanon was threatened and the forces of Lebanon were insufficient. Further the United States would expect Lebanon to file a complaint with the Security Council of the United Nations, that some Arab States should be prepared to publicly support the Lebanon appeal and if the United States assisted, it "would not be an issue of the internal question of the Lebanese presidential election." Although the bulk of the rebellious forces were Lebanese, there were outsiders and outside support. On this basis Lebanon did appeal to the Security Council, which organ agreed to send observers, who arrived on 12 June. On 14 July the royal family of Iraq was murdered and conflict threatened the entire Near East. On that day President Chamoun officially asked for United States assistance. The first United States forces landed on 15 July. On the same date, Great Britain sent troops to Jordan to sustain the independence of that nation.¹²⁹ President Eisenhower justified the actions on the basis of an insurrection fostered by Cairo, Damascus, and Moscow and said: "The avowed purpose of these activities was to overthrow the legally constituted Government of Lebanon and to install by violence a government which would subordinate the independence of Lebanon to the policies of the United Arab Republic."¹³⁰

Clearly there was an invitation from the government of Lebanon to the United States to intervene with armed forces and this invitation was in no way a coerced invitation. There is evidence of Egyptian and Russian aggression although it was not massive. Though it has been argued that the landing was also to protect United States property and citizens, there is little evidence of need for such protection. Here, too, the United States first sought effective help to Lebanon from the United Nations. The right of cooperative self-defense under Article 51 of the United Nations Charter was also cited by President Eisenhower, though this Article refers to armed attack and such was never alleged by Lebanon.¹³¹

¹²⁹ McClintock, *The American Landings in Lebanon*, United States Naval Institute Proceedings, Oct. 1962, p. 66.

¹³⁰ Message to Congress from President Eisenhower, July 15, 1958.

¹³¹ Potter, *Legal Aspects of the Beirut Landing*, 52 AM. J. INT'L L. 727, 728 (1958).

C. *HUNGARY*

A third example is a classic instance of intervention as understood by the writers and jurists. This was the military intervention of Russia in Hungary in **1956**. It is to be noted that the **USSR** had two treaties with Hungary forbidding intervention. Article 5 of the Treaty of Friendship, Cooperation and Mutual Assistance concluded at Moscow on **18 February 1948** binds the parties to "mutual respect of each other's sovereignty and independence as well as nonintervention in each other's internal affairs." Article 8 of the Warsaw Pact lays down the same rule. Notwithstanding, Russia claimed to have intervened in the uprising by invitation and on the basis of the Warsaw Pact which authorized the stationing of Russian troops in Hungary.¹³² Russia argued that a member of the Hungarian government asked for military aid. The truth of the matter is, however, that the established and legitimate government was that headed by Premier Nagy and the government headed by Kadar who asked for the aid was a government established by the military power of the Soviet.¹³³ The intervention of Russian military power was thus to assist either an insurgent force or at least it was to assist a government which under no circumstances represented the will of the people. It was not a government which had come to power by constitutional means.

D. *SUMMARY*

Greece, Lebanon and Hungary are not the only examples of civil conflict since World War II, a period marked by something less than internal stability. Other revolts, such as those against colonial powers have been omitted for they involve other issues which could only cloud a study and search for the guiding rules of international law. The examples of Viet Nam and the Huk activities in the Philippines would not add additional or different factors for analysis. The conflicts in Greece, Lebanon, and Hungary serve to point out that the revolutionary contests with which the world is now concerned are a part of the international struggle against communism. They are conflicts instigated by outside powers to destroy the legitimate governments. The free world is seeking not to maintain the status quo nor is it fomenting rebellion on those nations where the government is not under its control. The words of Wehberg are pertinent to the acts of the communists :

¹³² CORBETT, *LAW IN DIPLOMACY* 103 (1959).

¹³³ Wright, *Intervention*, 51 *AM. J. INT'L L.* 257 (1957).

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In an age of totalitarian ideas, however, the danger that a foreign Power may prevent the outbreak of revolution is considered smaller than the danger that a Government may endeavor to foster a revolution by direct or indirect means in order to help to power a movement with which it is in political sympathy in some other country.¹³⁴

These views expressed prior to World War II fit the situation in today's world when nations battle not for territory but for political control.¹³⁵

The United States intervention in Greece and Lebanon, though vastly different in operation, were much alike in legal concept. In each case, the entry of the United States armed forces into the arena of counterinsurgency was with the consent of the established and legitimate government. Even more, the entry was at the urgent request of a government fighting for its existence. The request was not a *quid pro quo* for economic aid but the request was made because the nation seeking the military aid was on the threshold of disaster. No coercion tainted the consent.

Nor do the Greece and Lebanon examples of aid to the legitimate government fit into the reasoning of Hall who would forbid intervention in civil strife against the rebels because there is doubt as to the outcome of the conflict. There was doubt as to the outcome in Greece and Lebanon but this was not because the rebels so obviously represented the will of the people. Rather, there was doubt of the outcome because the rebel forces were an international force supported and maintained from abroad. The uncertainty was not because the people of the nation were divided but because the measure of outside assistance, provided the minority in rebellion, weighted the scales against the constitutional government. The established government could not cope with the conflict because it was unable to pit its strength against the combined power of the communist world.

The United States operations in Greece and Lebanon were unilateral actions to enforce international law. The policy was quite properly counterintervention to assist the government in power to resist the illegal intervention of third states. Nor was the action of the United States in contravention of the United Nations Charter. The Security Council action had been ineffective and had not reached the stage where collective self-defense on the part of member nations was barred.

¹³⁴ Wehberg, *Civil War and International Law*, THE WORLD CRISIS 165 (Longmans, Green and Co. 1938).

¹³⁵ HUNTINGTON, INSTABILITY AT THE NON-STRATEGIC LEVEL OF CONFLICT 13 (1961).

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Compare the facts bearing on the lawfulness of United States policy in Greece and Lebanon and that of Russia in Hungary. Soviet tanks defied the treaty agreements solemnly made by the Soviet government with the government of Hungary. If a request were actually made by any force in Hungary, it was certainly not by the constitutional government. There was much evidence of coercion for any request which may have been made. In the Hungarian situation, the Hall argument against intervention where the outcome is in doubt has merit. No outside assistance was available to the established government to thwart the will of the people. The legal argument of counterintervention does not exist to sustain Soviet action before the tribunals of the world.

VI. CONCLUSIONS

The United States is now embarked on a program for providing military assistance to governments combating communist inspired revolutionists. This policy is in response to the declared intention of the communist world to intervene in uprisings throughout the world. Unlike the communists, the United States seeks always to carry out its foreign policy in consonance with the rule of law. This article has been devoted to resolving the question of the lawfulness of the counterinsurgency policy of the United States as it has been practiced and to determine the legal limitations, if any, on this policy.

There is legal justification and authority under international law to provide the assistance of armed forces of the United States to foreign governments in their battle against insurgency. The action of the United States is a form of intervention permissible under international law.

The analysis of the international law of intervention revealed that intervention was prohibited when either of two basic principles were violated. First, intervention is prohibited when the act of intervention subverts the principle of national independence of any nation so as to deny the people the right to determine their own form of government. The counterinsurgency program of the United States seeks not to violate this principle but instead to insure this right. The assistance of the United States armed forces has not been offered to any government so as to deny the will of the people but to guarantee that foreign force will not be successful in placing the people under a government not of their choosing. The historical acceptance by the United States of the

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right of revolution has not been reversed. The doctrine has been traditionally supported by the United States as a safeguard to national independence. Acceptance by United States of the doctrine should not be misunderstood or misinterpreted to serve as an invitation to other powers to instigate and aid in the overthrow of constitutional government.

Secondly, intervention is unlawful when it interferes with the principle of the right of self-defense. The counterinsurgency policy of the United States, as it is conceived and as it has been practiced, rather than interfering with a nation's right of self-defense, supports and assists in collective self-defense with other like-minded powers. The concept of United States intervention is to assist and not to impose the will of the United States on a state already on the brink of disaster.

The United States policy of counterinsurgency is not in violation of international law and is in fact a positive policy in support of the rule of law. The policy is designed to counter the unlawful acts of other states which have taken it upon themselves to unlawfully intervene in the domestic matters of other powers. It is the positive policy of the communist world to initiate, foster, and support revolt. Their policy is to deny the people of other states the exercise of their free will. Such unlawful and prohibited intervention clearly calls for sanctions to enforce international law. Until all nations practice "nonintervention," states must be able to look to others in the community of nations for assistance to resist unlawful intervention.

The practices of the United States in counterinsurgency have been permissible interventions. The United States has recognized not only the form but the substance of the law in the application of this policy. Consent, evidenced by a request for aid, has not been coerced.

The United States has consistently deferred to the international organizations and given these bodies an opportunity to consider and take action where there is a threat to the peace. When the international organization has taken action, the United States has cooperated fully. The assistance of the United States has been material and not merely vocal. It has only been when the international action has been ineffective or when the organization has failed to act that the United States has taken unilateral action. Full recognition has been given to the international efforts at collective intervention.

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There is, then, ample authority and justification under international law for assistance to governments fighting revolutionists as the policy has been practiced by the United States. The United States policy makers are fully aware of the limitations on their authority. Careful and documented evidence of foreign assistance to revolutionists by outside forces should continue to be sought before military assistance is proffered. Although the Truman and American Doctrines have been enunciated, aid should not be given in the absence of a request, and a request untainted by duress. No actions inimical to the policies and activities of the United Nations or the Organization of American States have been undertaken nor should they be. The United States has recognized the superior jurisdiction of those bodies when they have chosen to act and this limitation must continue to be observed.

Intervention by the armed forces of the United States to sustain the independence of other nations under the threat of communist supported insurrection is permissible. Within limitations which have been observed, this United States policy is justified under international law.

BRIBERY AND GRAFT*

BY MAJOR JACK H. CROUCHET**

I. INTRODUCTION

A. GENERAL

“[T]he public regards the acceptance of gratuities by its servants with grave suspicion.”¹

The United States Court of Military Appeals made the above quoted observation in *United States v. Marker*,² the first opinion of the Court concerning an offense similar to bribery or graft. Although the accused civilian in that case had induced a Japanese factory owner to bestow expensive favors upon him, he was charged only with service discrediting conduct. The accused was indeed the recipient of a gratuity other than those alleged in the specifications in that he escaped prosecution for the more serious offenses of bribery and graft.

The practice of reciting the acts of the accused, and alleging that such acts were service discrediting, had been established in military law long before the United States Court of Military Appeals came into existence.³ Prior to *Marker*, there had been no reported military cases in which the appellate agency required that the proof relate to every element of the offenses of bribery and graft prohibited by the United States Statutes. There were indeed many cases similar to bribery and graft, but the sufficiency of the specifications was usually measured by the resulting discrediting conduct rather than the elements of the substantive

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¹ *United States v. Marker*, 1 USCMA 393, 398, 3 CMR 127, 132 (1952).

² *United States v. Marker*, 1 USCMA 393, 3 CMR 127 (1952).

³ See CM 328248, Richardson, 77 BR 1, 18 (1948).

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offense as defined by statute.' In *Marker*, the Court pointed out that the acceptance of gifts by Army officers from persons with whom they are engaged in the transaction of business had repeatedly been held to be a violation of Article of War 96,⁵ and that the accused's misconduct was further borne out by the fact that it was condemned by then existing Army regulations.

The *Marker* case emphasizes the lack of understanding and the need for a comprehensive study of the military offenses of bribery and graft. The facts in that case were such that either of the offenses might properly have been alleged. The offenses committed by the accused were precisely the kind of offenses prohibited by United States statutes then in effect,⁶ but the accused was nonetheless charged only with prejudicial conduct in violation of Article of War 96.

The distinction between bribery, graft, and service discrediting conduct based upon the unlawful giving or acceptance of things of value has always been confusing to military appellate agencies. This fact is well illustrated by an early case⁷ in which the accused had been convicted of bribery. The United States Court of Military Appeals expressed the opinion that the offense was not bribery but similar to graft. In a separate opinion, the Chief Judge expressed his view that the offense was neither bribery nor similar to graft.

B. DEFINITIONS OF BRIBERY AND GRAFT

The offenses of bribery and graft are similar in that certain elements of the offenses are common to both. The military offense of bribery is generally defined as the promising, offering, or giving to, or the asking, accepting or receiving by, one occupying an official position or having official duties, of something of value with the corrupt intent to have influenced the official decision or action of such person, with respect to an official matter.⁸ Graft, on the other hand, prohibits public officials from unlawfully receiving any award or remuneration for services rendered or to be rendered in connection with any official matter in which the

⁴ See *ibid.*

⁵ Now UNIFORM CODE OF MILITARY JUSTICE [hereinafter cited as UCMJ] art. 134.

⁶ Act of June 26, 1948, C. 645, §§ 201-2, 62 Stat. 683, 691 (1948).

⁷ *United States v. Alexander*, 3 USCMA 346, 12 CMR 102 (1963).

⁸ ACM 10060, Graalum, 19 CMR 667, *pet. denied*, 6 USCMA 812, 19 CMR 413 (1966).

BRIBERY AND GRAFT

United States is interested,⁹ and it does not matter whether the official matter was performed with a corrupt intent.¹⁰ The United States Court of Military Appeals has looked to civilian authorities for assistance and approved the following definition of graft.

Advantage or personal gain received because of peculiar position or superior influence of one holding position of trust and confidence without rendering compensatory services, or dishonest transaction in relation to public or official acts, and sometime implies theft, corruption, dishonesty, fraud, or swindle, and always want of integrity.¹¹

The gravamen of the offense of graft is the extraction of private gain from another while holding a peculiar position of influence, or a dishonest transaction in relation to public or official acts.¹²

In each offense, there is an unlawful offer or acceptance, an official position, a thing of value, and an official matter. In bribery there is the additional element of a corrupt intent to influence the official decision or act. In graft, the additional element is the compensation for services rendered or to be rendered.

The offenses of bribery and graft are logically considered together because of their similarity. The United States Court of Military Appeals and the boards of review seldom discuss one without referring to the other. In discussing an element common to both offenses, an appellate body will sometimes refer to the offenses jointly although it appears that only one or the other is pertinent.¹³

The reported cases strongly suggest that accusers experience a great amount of difficulty in selecting the proper offense with which to charge an accused and are sometimes unaware that there are, in fact, separate and distinct offenses of bribery and graft.¹⁴ There are other cases in which the accuser obviously intended to charge the accused with either bribery or graft but failed in both because of the omission of an element essential to both offenses.¹⁵

The confusion is not restricted to the armed forces. A recognized authority on the law of crimes states that the subject of bribery and graft is covered by Article 127 of the *Uniform Code*

⁹ ACM 11615, Hoke, 21 CMR 681, *pet. denied*, 7 USCMA 766, 21 CMR 340 (1956).

¹⁰ *Razete v. United States*, 199 F.2d 44 (6th Cir. 1962).

¹¹ *United States v. Alexander*, 3 USCMA 346, 349, 12 CMR 102, 105 (1953).

¹² See dissent of Quinn, C.J., in *United States v. Alexander*, *supra* note 11.

¹³ ACM 5647, Standley, 6 CMR 610 (1952).

¹⁴ CM 201997, Mellon, 5 BR 337 (1934).

¹⁵ See, *e.g.*, ACM 11615, Hoke, 21 CMR 681, *pet. denied*, 7 USCMA 765, 21 CMR 340 (1956).

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of *Military Justice* under the related offense of **extortion**.¹⁶ This statement is, of course, completely erroneous.

C. HISTORY OF THE OFFENSES

An early definition of bribery suggests that the offense could not be committed unless the thing of value was corruptly accepted by a "man in judicial place."¹⁷ This appears to be an unwarranted restriction of the application of the offense or, if it was an accurate definition, the offense was more broadly defined shortly thereafter. Blackstone states that "bribery is where a judge or other person concerned in the administration of justice takes any undue reward to influence his behavior in office."¹⁸ Even Blackstone's definition has been liberally interpreted in the United States from the earliest times. A police officer could be indicted at common law for bribery because the courts held that bribery was the offering of any undue reward or remuneration to any public officer or other person entrusted with a public duty with a view to influencing his behavior in the discharge of his duties.¹⁹

In modern times, the common law offense of bribery was further enlarged to include any person whose ordinary profession or business relates to the administration of public justice²⁰ and to legislative officers.²¹ It then became commonly accepted that any person whose official conduct was in any way connected with the administration of the Government was a proper subject of the offense of bribery.²² The extent to which the offense has been enlarged is reflected in its definition by a modern authority who states that bribery is "the voluntary giving or receiving of anything of value in corrupt payment for an official act, done or to be done."²³

Although bribery was a misdemeanor at common law,²⁴ the statutes in the states of the United States usually make bribery a felony and generally prohibit the offense in several separate sections pertaining to different officials who may be bribed. In most

¹⁶ See CLARK AND MARSHALL, A TREATISE ON THE LAW OF CRIMES, 910 n. 33 (6th ed., Wingersby Rev. 1958).

¹⁷ 3 COKE, INSTITUTES 145 (1680).

¹⁸ 4 BLACKSTONE, COMMENTARIES 139 (1787).

¹⁹ *State v. Miles*, 89 Me. 142, 36 Atl. 70 (1896).

²⁰ See *State v. Harrah*, 101 W.Va. 300, 132 S.E. 654 (1926).

²¹ See *State v. Sullivan*, 110 Mo. App. 75, 84 S.W. 105 (1904).

²² See *Commonwealth v. Benedict*, 114 Pa. Supp. 183, 173 Atl. 850 (1934).

²³ 2 BISHOP, NEW CRIMINAL LAW 51 (8th ed. 1892).

²⁴ 2 BISHOP, NEW CRIMINAL LAW 54 (8th ed. 1892).

states, the different offenses are defined by statute. The statutes may apply to particular officers only, as judicial officers,²⁵ legislative or executive officers,²⁶ or they may apply to other persons not regularly compensated by the state government such as witnesses upon a trial.²⁷ It is not unusual for the legislatures to prohibit bribes even to persons who are in no way connected with the state government such as officers²⁸ or employees²⁹ of public institutions, representatives of a labor organization,³⁰ and even players and referees in sporting events.³¹

The laws of the various states have not only increased the number of persons who may be regarded as potential offenders but the scope of the offense is being enlarged upon. Recently there has developed an offense which has come to be known as commercial bribery relating to unfair trade practices. This offense has been described as "the advantage which one competitor secures over his fellow competitors by his secret and corrupt dealing with employees or agents of prospective purchasers."³²

D. CORRUPTION IN GOVERNMENT

A public official occupies a position which, because of the nature of the duties he is required to perform, offers him an opportunity to bestow favor upon individuals with private interests. A litigant is interested in the decision of the presiding judge; a defendant is vitally interested not only in the decision of the court but every member of the jury; and almost all persons have an interest in the laws enacted by the legislature.

The primary loyalty of a public official must be to the government which compensates him for his services. He can render his services properly to such government only if he renders them with undivided loyalty, without conflicting interests. Throughout the history of the United States, and the states within the United States, however, there have been instances of corruption within each branch of the Government. Prior to the enactment of laws

²⁵ See *State v. Henning*, 33 Ind. 189 (1870); *State v. Currie*, 35 Tex. 18 (1872); *State v. Lusk*, 16 W.Va. 767 (1880).

²⁶ See *People v. Jaehne*, 103 N.Y. 182, 8 N.E. 374 (1886).

²⁷ See N.Y. PENAL LAW § 379.

²⁸ See *Prosecuting Attorney v. Judge*, 59 Mich. 529, 26 N.W. 694 (1886).

²⁹ Cf. *ARIZ. REV. STAT. § 15-818* (1953).

³⁰ See N.Y. PENAL LAW § 380.

³¹ See N.Y. PENAL LAW § 382.

³² *American Distilling Co. v. Wisconsin Liquor Co.*, 104 F.2d 582, 585 (7th Cir. 1939).

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granting higher pay to public officials, many officials, especially among the state legislators, were in debt to persons with private interests who contributed substantially to obtaining the official's position. **Low** pay and a lack of prestige made lower officials particularly susceptible to corruption. Unscrupulous persons with private interests sought to capitalize upon such unfavorable conditions.³³

The method of enticing public officials in modern times is more refined. The registered lobbyist may attempt through favors to put the public official under a feeling of personal obligation so that the legislator no longer believes that his primary obligation is to the public but rather to his benefactor.³⁴ A firm desiring government contracts may offer to a contracting officer certain gratuities which, on their face, appear to be within the realm of acceptable amenities. The extent to which such favors extended in World War II was revealed in Hearings on the Reconstruction Finance Corporation where the evidence reflected that one Detroit manufacturer alone spent and charged to the cost of war contracts the following sums :

Jewelry	\$ 65,495
Liquor (in cases)	22,331
Night Clubs	35,822
Gifts	25,639
Unexplained	132,645 ³⁵

It is frequently difficult to determine when the acceptance of a favor is not predicated upon a past or future consideration or favor. Most legislators are showered with gifts from their constituents which, if returned, might cause embarrassment. A contracting or inspecting officer who inspects a government project will frequently be offered small gratuities which may or may not be mere expressions of a cordial **relationship**.³⁶ When the contract is big or the competition is keen, the temptation of the donor will be greater even if he does not consciously expect a favor in return.

³³ See generally, ALLEN, OUR SOVEREIGN STATE (1949).

³⁴ See DOUGLAS, **ETHICS** IN GOVERNMENT (1952).

³⁵ Study of Reconstruction Finance Corporation; Hearings Before a Subcommittee of the Senate Committee on Banking and Currency, 82d Congress, 1st Sess., **Lending Policy**, Pt 2, at 1038-1039.

³⁶ This article is limited to a consideration of whether the acceptance or giving of gratuities amounts to bribery or graft.

E. STATUTES PROHIBITING THE OFFENSES

The United States Congress early enacted various statutes punishing the unlawful offer or acceptance of gratuities which had formerly been punishable at common law.³⁷ Laws have been enacted from time to time to extend the scope of the offense and to increase the group of persons to whom applicable. The most recent revision of statute expands this legislation under the general heading of **conflicts of interest**.

Crimes involving the corruption of public officials are currently punishable under the various provisions of Title 18, **United States Code**. These statutes were comprehensively revised and amended in 1962.³⁸ Section 201 by definition brings numerous categories of persons — Government employees, members of Congress and others — under the jurisdiction and supervision of this act. It tends to clarify and make uniform the acts of bribery and the intent or purpose making these unlawful. This section sets out maximum penalties making specific exemption for payment of reasonable expense for ordinary or expert witnesses.³⁹ Section 202 sets up by definition those employees of government in Legislative and the Executive Branch subject to the conflict of interest provisions by establishing a category called “special government employees.” Such personnel constitute those persons of intermittent and temporary employment as contrasted with those who have full-time employment. Such personnel are employed with or without compensation to perform temporary duties for not more than 130 days in any period of 365 consecutive days. This provision applies to officers of the armed forces on active duty including those in the Reserve and National Guard on voluntary extended active duty, but makes those officers of the Reserve and National Guard on active duty for training or placed on involuntary active duty special government employees.⁴⁰ Enlisted personnel are specifically

³⁷ *United States v. Green*, 136 Fed. 618 (N.D.N.Y.), *aff'd* 199 U.S. 601 (1905).

³⁸ See Pub. L. No. 87-849, 87th Congress (Oct. 23, 1962), 76 Stat. 1119-1126, 18 U.S.C. §§ 201-209, 218 (Supp. IV, 1963).

³⁹ 18 U.S.C. § 201 (Supp. IV, 1963).

⁴⁰ Officers of the armed forces on active duty are subject to the full impact of this legislation whether Regular, Reserve, or National Guard. Those officers voluntarily serving more than 130 days are treated as any other government employee. Those officers serving less than 130 days in any 365-day period are classified as special government employees. Those officers of the Reserve and National Guard serving pursuant to involuntary recall regardless of the period of time in excess of 130 days are classified as special government employees as it would cause unjustified hardship to subject them

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excluded.” Members of Congress, officers, and employees of Legislative, Executive or Judicial Branches are prohibited from receiving compensation for services for representation in proceedings before Federal departments or agencies in which the Government is a party or has an interest. Exception is made for special employees so long as the matter is not one in which he participated as a government employee or was not employed in excess of 60 days in any one 365-day period.⁴² Members of Congress are specifically forbidden to practice before the Court of Claims,⁴³ and in addition officers and employees of the Executive, Legislative, and Judicial Branches, its departments and agencies, shall not act as an agent or attorney in the prosecution of any claim, or in which the United States has an interest except in the discharge of their official duties. Special employees are treated in a similar matter as in the exception above.⁴⁴ Retired officers while not on active duty not otherwise employees of the United States Government are not subject to these conflict of interest provisions.⁴⁵ Former government officers or employees are permanently barred from matters with which they had a direct connection and are further barred for one year in any other matter in which the Government had an interest. If one partner is subject to any of these provisions, the same ban applies to the other partner or partners as that of the formerly employed partner but specialized and technically qualified experts with a certification that it is in the public interest duly published in the Federal Register may be permitted to act or appear without being subject to the ban of the statute.⁴⁶ Further disqualification is had by any employee of the Executive Branch of the Government or independent agency or a special government employee as defined in which the employee has an outside financial interest except where prior permission and publication of such

to all the prohibitions applicable to the officers and employees of the government. See 2 U.S. CODE CONG. AND AD. NEWS, 87th Cong., 2d Sess., 3858 (1962).

⁴¹ 18 U.S.C. § 202 (Supp. IV, 1963).

⁴² 18 U.S.C. § 203 (Supp. IV, 1963).

⁴³ 18 U.S.C. § 204 (Supp. IV, 1963).

⁴⁴ 18 U.S.C. § 205 (Supp. IV, 1963).

⁴⁵ 18 U.S.C. § 206 (Supp. IV, 1963). The bill repeals title 18, *United States Code*, sections 281 and 283, except as they apply to retired officers. 18 U.S.C. § 218 (Supp. IV, 1963). Section 281 avoids the right to the sale of anything to the Government through the department in whose service they hold a retired status. 18 U.S.C. § 281. The retired officer may not act or represent a claimant against the United States within two years of his date of retirement or act in any matter against the United States with which he was directly connected. 18 U.S.C. § 283.

⁴⁶ 18 U.S.C. § 207 (Supp. IV, 1963).

authorization is had in the Federal Register. If the financial interest is so inconsequential as to have little effect on the integrity of the employee, the doctrine of *de minimis non curat lex* will apply." The integrity of an employee is further circumscribed by a requirement that compensation for services shall be paid by the Government, not by any other agency except for pension, insurance, or other welfare provisions.⁴⁸ Finally, a provision allows a department or agency head to avoid as illegal or rescind a transaction under these provisions wherein a final conviction has been had under the bribery or conflict of interest statute.⁴⁹

Though the bribery and graft provisions of the statute and the conflict of interest portions were enacted in recognition of the principle that no man can serve two masters, the most recent change relieves both the Government itself and special government employees from prior unduly harsh and restrictive provisions and thus permits the Government the use of specialized technical personnel where badly needed.

11. THE MILITARY OFFENSE

A. HISTORY

On September 20, 1776, Congress adopted the Articles of War of 1776. Section IV, Article 6, prohibited any commissary from taking money or other things by way of gratification on the mustering of a unit or on the signing of the muster rolls. This provision was substantially reenacted as Article 16 in the Code of 1806; as Article 6 of the 1874 Articles of War; and as Article 56 of the 1920 Articles of War. The essential elements of the offense were the acceptance of the favor by way of gratification and the rendition of services while mustering a unit. The offense became extinct for all practical purposes when a board of review decided that the offense could no longer be committed because Article 56 had lost its meaning with the elimination of the muster and substitution of the Morning Report.⁵⁰

Although Article of War 56 and its predecessors were the only articles specifically prohibiting offenses similar to bribery or graft, it would be incorrect to state that those articles alone were the predecessors of the current bribery and graft offenses in military law. Offenses in the nature of violations of then current bribery

⁴⁷ 18 U.S.C. § 208 (Supp. IV, 1963).

⁴⁸ 18 U.S.C. § 209 (Supp. IV, 1963).

⁴⁹ 18 U.S.C. § 218 (Supp. IV, 1963).

⁵⁰ CM 320885, Smith, 70 BR 199 (1947).

and graft statutes were punishable under the general articles which permitted the punishment of disorders not specifically prohibited otherwise in the Articles of War.⁵¹

**B. DECISIONS PRIOR TO THE UNIFORM CODE
OF MILITARY JUSTICE**

In an early case, a board of review had the opportunity to consider the case of an accused who had been convicted of wrongfully accepting money from a firm with which it was the accused's duty as an agent of the Government to carry on negotiations.⁵² The board noted that Army regulations, then effective, prohibited the accused's unlawful conduct but found that even if such regulations did not exist, the conduct of the accused was a discredit to the service. A portion of the board's opinion is worthy of citation because it set a standard upon which numerous subsequent cases were decided and was cited in virtually all subsequent cases of a like nature. The board stated :

The real question is whether the acceptance of the money by accused, even if judged in its most favorable light as an unsolicited gift predicated upon no past or future consideration or favor, is an offense in violation of Article of War 96. It is the essence of naivete to believe that such a gift can be accepted without kindling forbidden hopes in the heart of the giver or stultifying the recipient's sense of single minded obligations to the Government. The public regards the acceptance of gratuities by public servants with grave suspicion. The acceptance of this money by the accused was a suspicious circumstance. It tended to belittle the accused, and to bring discredit and disrepute not only to him but to the service which he represented. *Army officerstransacting public business are, like Caesar's wife, required to be beyond suspicion.*⁵³

Boards of review frequently referred to United States statutes, then current, but were not particularly concerned if the specification alleged less than all of the elements required by statute. It did not matter, for example, if the accused was not acting in an official capacity, or that the decision influenced did not concern an official matter.⁵⁴ Even where the evidence would have been insufficient to convict in Federal courts, boards of review affirmed the convictions of accused who had been charged with soliciting favors to withhold evidence at trial,⁵⁵ receiving compensation from

⁵¹ See generally, Hagan, *The General Article—Elemental Confusion*, 10 MIL. L. REV. 63 (1960).

⁵² CM 235011, Goodman, 21 BR 243 (1943).

⁵³ *Id.* at 254 (emphasis added).

⁵⁴ CM 314296, Lescallett, 64 BR 103 (1946).

⁵⁵ See CM 313891, Weintraub, 63 BR 317 (1946).

a construction company doing business with the United States,⁵⁶ and taking money from a medical patient in exchange for an offer to obtain a discharge.⁵⁷ In the last cited case, the board indicated that it was unnecessary to determine whether or not the offenses fell within the provisions of the Federal bribery statute because “even if they do not, they are tainted with corruptness and moral turpitude.”⁵⁸

Boards of review sometimes relied upon then current Army regulations prohibiting the acceptance of gratuities in order to determine whether the accused’s conduct constituted prejudicial conduct. Reliance upon regulations, however, was usually restricted to those cases which, even under a most liberal interpretation, could not be held similar to bribery or graft as those offenses were described by United States statutes.⁵⁹ If it appeared that the regulations were not in fact violated, the boards might nonetheless sustain a conviction because “the transaction was in contravention of the spirit if not the letter of the . . . Army Regulations.”⁶⁰ Furthermore, it was unnecessary to allege a violation of the Army regulations,⁶¹ and it did not matter whether the accused’s acceptance was predicated upon past or future consideration.⁶²

The above cited cases indicate that an accused who was charged with any offense similar to bribery or graft under the Articles of War was, at best, in a precarious position. More often than not, the specifications were drawn to conform to the acts allegedly committed by the accused rather than to conform to specific offenses in violation of the statutes. The boards, as a general rule, discussed the evidence at length to determine if the proof conformed to the specifications, and if the acts alleged therein, judged subjectively, were service discrediting, the conviction was sustained. The boards appear to have been more interested in facts than law, and, the higher the rank of the accused, the more detailed the recitation of the facts.⁶³

⁵⁶ See CM 325040, Katches, 74 BR 47 (1947).

⁵⁷ See CM 248104, Porter, 31 BR 137 (1944).

⁵⁸ See *id.* at 143.

⁵⁹ See CM 264728, Price, 42 BR 243 (1944).

⁶⁰ CM 278249, Waldman, 51 BR 347,359 (1945).

⁶¹ CM 261994, Cunningham, 40 BR 379 (1944).

⁶² CM 267639, Tressler, 44 BR 27 (1944) ; CM 235011, Goodman, 21 BR 243 (1943).

⁶³ See CM 203355, Williams, 7 BR 77 (1935).

C. THE OFFENSES PROHIBITED BY THE UNIFORM CODE OF MILITARY JUSTICE

The *Uniform Code of Military Justice* contains no provision specifically condemning the offenses of bribery and graft. Article 134 of the Code, however, provides for the punishment of three categories of offenses, the third of which includes all crimes and offenses not capital, and not specifically mentioned in the Code. Such crimes and offenses include those acts or omissions which are denounced as crimes or offenses by enactments of Congress or under authority of Congress and made triable in the Federal civil courts.⁶⁴

The noncapital crimes and offenses made punishable by the third portion of Article 134 must necessarily occur within the geographic boundaries of the areas in which they are applicable.⁶⁵ A crime against an individual person prohibited by Title 18, *United States Code*, is limited in its application to the special maritime and territorial jurisdiction of the United States.⁶⁶ However, certain other crimes and offenses are directly injurious to the Government of the United States and are punishable regardless of where the wrongful act or omission occurred.⁶⁷ The United States Supreme Court has indicated that the crime of bribery falls within this category.⁶⁸ It follows that graft, which is so similar to bribery, is also an offense against the *United States Code* which may be tried in the Federal courts even when committed beyond the territorial jurisdiction of the United States. Accordingly, the crimes of bribery and graft, even if committed beyond the maritime and territorial jurisdiction of the United States, are punishable by courts-martial as violations of the third category of offenses proscribed by Article 134.

Bribery and graft are also offenses under the first and second categories of offenses made punishable by Article 134 which include, respectively, (1) disorders and neglects to the prejudice of good order and discipline in the armed forces, and (2) conduct of

⁶⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951 [hereinafter cited as MCM, 1951] para. 213c.

⁶⁵ *Ibid.*

⁶⁶ 18 U.S.C. § 7 (1948).

⁶⁷ MCM, 1951, para. 213c(1).

⁶⁸ *United States v. Bowman*, 260 U.S. 92, 99 (1922).

a nature to bring discredit upon the armed forces.⁶⁹ If the accused is an officer, his offense may also be a violation of Article 133.⁷⁰

The *Manual for Courts-Martial, United States, 1951*, is silent with respect to the offenses of bribery and graft except that Model Specifications 127 and 128⁷¹ are patterned upon similar offenses described in Title 18, *United States Code*, and a maximum punishment is prescribed for the offenses.⁷² The Model Specifications are similar to each other in that either may be used to allege either bribery or graft but differ in that one is applicable to the recipient or prospective recipient whereas the other is applicable to the giver or prospective giver of the gratuity. The Model Specifications are patterned upon 18 *United States Code*, sections 201 and 203. Section 201 (b)–(d) requires the element of a corrupt intent to have official action influenced. Such intent is not an element of the graft offense prohibited by Sections 201 (f)–(i) and 203. The offenses requiring a corrupt intent carry a more severe penalty than the graft offenses. The lack of appreciation for the distinction between the military offenses is based primarily upon the failure of appellate agencies to recognize that each of the model specifications is patterned upon distinct and separate provisions of United States statutes.

The failure of convening authorities to allege properly the accused's offenses of bribery or graft frequently results in convictions which must be reversed,⁷³ or approved only with respect to a lesser included offense⁷⁴ or an offense similar to the one charged.⁷⁵ The United States Court of Military Appeals and the boards of review require strict proof as to each element of the offense in order to sustain a conviction of bribery or graft.⁷⁶ If the evidence is insufficient to sustain the conviction of the principal offense, the failure will not excuse the accused from the consequences of his

⁶⁹ ACM 10420, Hounshell, 19 CMR 906 (1955), *aff'd on other offenses*, 7 USCMA 3, 21 CMR 129 (1956).

⁷⁰ ACM 8609, Brossman, 16 CMR 721, *pet. denied*, 5 USCMA 834, 16 CMR 292 (1954).

⁷¹ MCM, 1951, app. 6c, at 489.

⁷² MCM, 1951, para. 127c, Table of Maximum Punishments, Sec. A, at 225.

⁷³ See ACM 10420, Hounshell, 19 CMR 906 (1955), *aff'd on other offenses*, 7 USCMA 3, 21 CMR 129 (1956).

⁷⁴ See ACM 13352, Williams, 23 CMR 868 (1957).

⁷⁵ See ACM 11938, Gunnels, 21 CMR 925 (1956), *aff'd in part on other issues*, 8 USCMA 130, 23 CMR 354 (1957); ACM 12106, Moore, 22 CMR 756, *pet. denied*, 7 USCMA 781, 22 CMR 331 (1956).

⁷⁶ See *United States v. Alexander*, 3 USCMA 346, 12 CMR 102 (1953); ACM 11615, Hoke, 21 CMR 681, *pet. denied*, 7 USCMA 765, 21 CMR 340 (1956).

corrupt conduct.⁷⁷ The resulting offense may be service discrediting conduct or a disorder to the prejudice of good order and discipline in the **armed forces.**⁷⁸ The result may be an offense so similar to bribery or graft that the authorized punishment for bribery or graft is considered applicable.⁷⁹

Cheating and dishonest transactions are offenses which have a direct impact on discipline in the services and are a discredit to the armed forces.⁸⁰ Cheating may be similar to bribery or graft, depending upon the circumstances, and if it does not constitute either graft or bribery, it may nevertheless constitute a disorder under Article 134.⁸¹

Article 127 prohibits the offense of extortion which is described in military law as the communication of a threat to another person with the intention thereby to obtain anything of value or any acquittance, advantage, or immunity of any description. Extortion differs from bribery and graft principally in that the thing of value is secured by threat rather than by agreement.

111. THE ELEMENTS OF THE OFFENSES

A. *THE OFFER OR ACCEPTANCE*

An offer made to a public official must be certain and capable of being accepted without further conditions. The language used by the offeror must encompass a proposal which, without more, one willing to be bribed could agree to accept. An inquiry in the form of a question is usually not sufficient to satisfy the element because an inquiry is considered to be preliminary to a bribe.⁸² However, if the question is so phrased that it could only be interpreted as an offer, the element would be satisfied.⁸³

The effectiveness of the offer is not diminished if subsequent events disclose that it need not have been made. It is only required that the accused had an intent at the time the offer was made to gain favorable consideration. However, if the offer is made by

⁷⁷ ACM 5615, Sippel, 8 CMR 698 (1953), *aff'd*, 4 USCMA 50, 15 CMR 50 (1954).

⁷⁸ CM 402675, Coogan, 28 CMR 595 (1959), *pet. denied*, 11 USCMA 784, 29 CMR 586 (1960).

⁷⁹ United States v. Bey, 4 USCMA 665, 16 CMR 239 (1954); United States v. Alexander, 3 USCMA 346, 12 CMR 102 (1953).

⁸⁰ United States v. Holt, 7 USCMA 617, 23 CMR 81 (1957).

⁸¹ *Ibid.*

⁸² See United States v. Morrison, 10 USCMA 525, 28 CMR 91 (1959).

⁸³ *Ibid.*

one under illegal arrest for his **release**⁸⁴ or if the statute commanding the act which the official agreed not to perform is **unconstitutional**,⁸⁵ the offer is not corrupt for the purpose of the offense.

There is no requirement that the offer of the accused be accepted by the person **importuned**,⁸⁶ or that the unlawful compensation be actually received by an official, inasmuch as a mutual criminal intent between the giver and taker is not necessary to the commission of the offense.⁸⁷

An offer of a thing of value to a public official is not in itself wrongful. In the absence of proof that the accused made his offer with a corrupt intent, the specification must fail, and the mere words "wrongfully and unlawfully" will not transform the words of the specification into an **offense**.⁸⁸ The compensation for services rendered may be for the benefit of a person other than the public official who rendered the **services**.⁸⁹

B. THE OFFICIAL POSITION

The offenses of bribery and graft require that the person corrupted or sought to be corrupted occupy a status which requires the performance of official duties on behalf of the United **States**.⁹⁰ Any clerk, no matter how subordinate his position, is expressly included, and forbidden to do the things which are made unlawful by the comprehensive language of the law.⁹¹ This broad coverage includes personnel of the armed **forces**.⁹²

The nature of the duties of the officer or enlisted man, rather than his rank, determines whether he occupies an official position. A person whose position invests him with the status of an official capable of being bribed does not continue to occupy that status when he is performing functions unrelated to his official duties, such as acting as a croupier in a game of chance.⁹³

⁸⁴ *Moore v. State*, 44 Tex. Cr. 159, 69 S.W. 521 (1902).

⁸⁵ *United States v. Boyer*, 85 Fed. 425 (W.D. Mo. 1898).

⁸⁶ ACM 10226, Sax, 19 CMR 826, *pet. denied*, 6 USCA 822, 19 CMR 413 (1955).

⁸⁷ *Cf. United States v. Worrall*, 2 U.S. (2 Dall.) 384 (C.C.D. Pa. 1798).

⁸⁸ CM 395553, Smith, 23 CMR 629 (1957).

⁸⁹ *Cf. United States v. Shirey*, 168 F.Supp. 382 (M.D. Pa. 1958).

⁹⁰ CM 395553, Smith, 23 CMR 629 (1957).

⁹¹ *United States v. Booth*, 148 Fed. 112 (C.C.D. Ore. 1906); ACM 13352, Williams, 23 CMR 868 (1957).

⁹² See *Hurley v. United States*, 192 F.2d 297 (4th Cir. 1951).

⁹³ *United States v. Holt*, 7 USCA 617, 23 CMR 81 (1957).

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The accused need not be acting in an official position when he accepts an unlawful gratuity if the services he promises impliedly include the use of his status for the benefit of the offeree.⁹⁴ In *United States v. Alexander*,⁹⁵ the accused accepted money for transporting a Korean prostitute in a truck which he had misappropriated. The majority of the Court of Military Appeals clothed the accused in a cloak of officiality by pointing out that he apparently had the authority to drive the vehicle and that he represented to others that he had a valid trip ticket. The Court stated that it would be anomalous to hold that the accused could not be guilty of graft only because he was not performing his duties, but he would be guilty of such offense if he had been lawfully driving the vehicle. It is unlikely that the *Alexander* case would be cited as precedent by the Court today in view of the fact that the decision is not well reasoned and the only remaining member of the Court, Chief Judge Quinn, expressed the following sentiments in his dissent :

... by some strange alchemy, the majority has created for the accused a sort of de facto status of officiality so as to hold him accountable on the basis of a dishonest transaction in relation to public or official acts.⁹⁶

The applicable test to determine if the acts alleged fall within the scope of the duties of the official sought to be corrupted is whether such official had the apparent ability to comply with the request.⁹⁷ The military offenses only require that the accused occupy some position which has a relationship to the service he renders or is to render in exchange for the remuneration he asks or accepts.⁹⁸

In civilian jurisdictions, it is unnecessary to allege or prove that the accused was acting in an official capacity if he was, in fact, an officer of the United States.⁹⁹ Military appellate authorities reject this precedent and have expressed the opinion that the official position is an element which must both be alleged and proved.¹⁰⁰ In *United States v. Hoke*,¹⁰¹ the accused was convicted of offering money to a fellow airman for the purpose of inducing him to make a false official statement. The board of review held

⁹⁴ ACM 10912, Kalmaer, 20 CMR 748, *pet. denied*, 6 USCMA 834, 20 CMR 398 (1955).

⁹⁵ 3 USCMA 346, 12 CMR 102 (1953).

⁹⁶ *Id.* at 350, 12 CMR at 106.

⁹⁷ ACM 13352, Williams, 23 CMR 868 (1957).

⁹⁸ ACM 5249, Adren, 7 CMR 602 (1952).

⁹⁹ *Cf. Hurley v. United States*, 192 F.2d 297 (4th Cir. 1951).

¹⁰⁰ See ACM 13352, Williams, 23 CMR 868 (1957).

¹⁰¹ ACM 11615, Hoke, 21 CMR 681, *pet. denied*, 7 USCMA 765, 21 CMR 340 (1956).

that the offense was neither bribery nor graft because the specification failed to allege that the offeree possessed any color of authority to an official position.

The accused's official position must be alleged with particularity. The mere description of the accused by the customary statement of grade, organization, and armed force is insufficient to cure an error of omission in military courts.¹⁰²

C. THE THING OF VALUE

The gratuity offered or given to one occupying an official position may be of any value, but it must be something real, substantial, and of value to the receiver. It must not be something imaginary, illusive, or amounting to nothing more than the gratification of a wish. It may be money, property, services, or anything else of value, although it need not be of monetary value. The accused himself need not gain a personal advantage of pecuniary value from the transaction.¹⁰³

The cost of a gratuity, even if nominal, is not necessarily the test or standard by which its value to the accused is measured.¹⁰⁴ "The acceptance of five dollars in return for assisting another in obtaining pay due is sufficient to satisfy the requirement."¹⁰⁵ The solicitation of dinners from subordinates upon their promotion was not sufficient to hold the accused guilty of solicitation of favors or gifts in violation of Article of War 96.¹⁰⁶

The gratuity is sometimes of such a nature that it is difficult to determine whether it is in fact a thing of value. The sale of a car at a discount,¹⁰⁷ the transfer of money under the guise of a loan,¹⁰⁸ the reinstatement of a dismissed employee,¹⁰⁹ and even a woman's virtue¹¹⁰ are things of value which satisfy the required element in bribery and graft.

¹⁰² ACM 13352, Williams, 23 CMR 868 (1957).

¹⁰³ ACM 8609, Brossman, 16 CMR 721, *pet. denied*, 5 USCMA 834, 16 CMR 292 (1954).

¹⁰⁴ CM 278249, Waldman, 51 BR 347 (1945).

¹⁰⁵ ACM 5547, Standley, 6 CMR 610 (1952).

¹⁰⁶ CM 240176, Freimuth, 25 BR 369 (1943).

¹⁰⁷ *State v. Sawyer*, 266 Wisc. 494, 63 N.W.2d 749 (1954).

¹⁰⁸ *Krogmann v. United States*, 225 F.2d 220 (6th Cir. 1955).

¹⁰⁹ *People ex rel. Dickinson v. Van de Carr*, 87 App. Div. 386, 18 N.Y. Cr. 31 (1903).

¹¹⁰ *Cf. Scott v. State*, 107 Ohio St. 475, 141 N.E. 19 (1923).

The actual tender of the thing of value is unnecessary, any expression of an ability to produce being sufficient.¹¹¹ A mere inquiry whether a person is willing to take a bribe, however, is not an offer of something of value because something more is needed before the offer becomes certain and consequently of value.¹¹²

D. THE CORRUPT INTENT (BRIBERY)

The essential element of the offense of bribery which distinguishes it from graft is the corrupt intent to influence official action. The corrupt intent may be either in the heart of the giver or the official who is willing to have his action or decision influenced. It is the absence of this element which frequently makes it permissible to give or to receive gratuities. Aside from prevailing government regulations prohibiting the giving and acceptance of gifts, it would not be an offense for a commanding officer or an elected official to accept a token of esteem from his subordinates because no corrupt intent to influence official action motivates the gift.

The official who has unlawfully accepted a gratuity will frequently deny that he did so with a corrupt intent. However, if the payment was made under suspicious circumstances and under conditions which would be conducive to corruption and disloyalty to the Army, an inference of a corrupt intent may be justified.¹¹³ The official's unequivocal denial that his decisions were in any way influenced by the gratuities he received is not similarly interpreted where it is the giver who is charged with bribery and the gratuities were in fact given after the action was completed. In the latter case, it may not be presumed that there was any connection between the giving of the gratuity and the granting of the requested official action.¹¹⁴

The intent to influence official action is universally recognized as an essential element of the offense of bribery,¹¹⁵ and it was so recognized at common law.¹¹⁶ Military judicial authorities have consistently held that such intent is an essential element of the

¹¹¹ *Lee v. State*, 47 Tex. Cr. 620, 85 S.W. 804 (1905).

¹¹² *United States v. Morrison*, 10 USCMA 525, 28 CMR 91 (1959).

¹¹³ CM ETO 17169, MacDowell, 32 BR (ETO) 1 (1945).

¹¹⁴ ACM 10420, Hounshell, 19 CMR 906 (1955), *aff'd on other offenses*, 7 USCMA 3, 21 CMR 129 (1956).

¹¹⁵ See *United States v. Birdsall*, 233 U.S. 223 (1913); *United States v. Alexander*, 3 USCMA 346, 12 CMR 102 (1953).

¹¹⁶ See *State v. Pritchard*, 107 N.C. 921, 12 S.E. 50 (1890).

offense.¹¹⁷ The intent must be accompanied by an offer capable of being **accepted**,¹¹⁸ and it must pertain to an official duty.¹¹⁹

E. THE RENDITION OF SERVICES (GRAFT)

The feature which distinguishes **graft** from the crime of bribery is that the unlawful compensation in graft is given or received in recognition of services rendered or to be rendered rather than with an intent to influence official action. The services need not have been rendered with a corrupt intent or as the result of the unlawful receipt of remuneration. The services, in fact, may have been rendered honestly and prior to an acquaintance between the necessary parties. The offense may be complete even if services were not rendered at all because the defendant's guilt is established if the evidence shows that he made an agreement to render such services.¹²⁰

The nature of services rendered or to be rendered is not restricted so long as they are related to proceedings or other official matters in which the United States is a party or interested therein.¹²¹ Appellate authorities have recognized that assignment of **personnel**,¹²² assistance in the securing of government **contracts**,¹²³ and driving a government vehicle¹²⁴ are all services in which the United States is interested.

F. THE OFFICIAL MATTER

The corruption of the official must necessarily relate to a proceeding or other official matter in which the United **States** is a party directly or indirectly interested, or the offense can be neither bribery nor **graft**.¹²⁵ The United **States** is interested in all official

¹¹⁷ See *United States v. Bey*, 4 USCMA 665, 16 CMR 239 (1954); *ACM 5038, Danczak*, 5 CMR 785 (1952); *ACM 10420, Hounshell*, 19 CMR 906 (1955), *aff'd on other offenses*, 7 USCMA 3, 21 CMR 129 (1966).

¹¹⁸ *United States v. Morrison*, 10 USCMA 525, 28 CMR 91 (1959).

¹¹⁹ *United States v. Holt*, 7 USCMA 617, 23 CMR 81 (1957).

¹²⁰ *ACM 5547, Standley*, 6 CMR 610 (1952).

¹²¹ But see 18 U.S.C. § 209, which permits states, counties, and municipalities to contribute to salaries, permits government employees to participate in employees' welfare and benefit plans maintained by prior private employer and excludes from the prohibition "special Government employees" (see note 40 *supra* and text accompanying).

¹²² See *ACM 5038, Danczak*, 5 CMR 785 (1962).

¹²³ See *CM 244291, Finnman*, 28 BR 245 (1943).

¹²⁴ See *United States v. Alexander*, 3 USCMA 346, 12 CMR 102 (1953).

¹²⁵ *ACM 10226, Sax*, 19 CMR 826, *pet. denied*, 6 USCMA 822, 19 CMR 413 (1955).

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actions performed by its **military** personnel, no matter how insignificant the position. The clerk who merely performs routine clerical duties is performing duties in which the United States is interested.¹²⁶

The official matter constituting the element must be performed in the discharge of the official position which is sought to be corrupted. It is not a defense to the charge that the official act alleged was an abuse of authority¹²⁷ or in excess of the powers of the office.¹²⁸ If the accused occupied a position by virtue of which he had some range of official action with respect to the official act alleged, the element is satisfied.¹²⁹ However, if the act is so foreign to the duties of the official as to lack even color of authority, there is no offense.¹³⁰

There is no requirement that the official action alleged be a statutory **duty**.¹³¹ It is sufficient if it be part of the procedure of a governmental agency established by **usage**,¹³² but it is not an offense if the act is in discharge of a mere moral **duty**.¹³³

The intent to corrupt the official position is the evil sought to be prevented. Accordingly, an officer who accepts money for doing an official act which it is his duty to perform may be guilty of bribery or **graft**.¹³⁴ On the other hand, an officer may be guilty of the offense even though the official acts alleged were never actually accomplished.¹³⁵

The official matter and the interest therein of the United States must be alleged. In military cases, however, it is sufficient if the act alone is alleged, provided the act itself clearly reflects the interest of the United States ~ . ~ ~ ~

¹²⁶ ACM 10050, Graalum, 19 CMR 667, *pet. denied*, 6 USCMA 812, 19 CMR 413 (1955).

¹²⁷ CM 314296, Lescallett, 64 BR 103 (1946).

¹²⁸ *Cf.* Glover v. State, 109 Ind. 391, 10 N.E. 282 (1887).

¹²⁹ ACM 13352, Williams, 23 CMR 868 (1957).

¹³⁰ State v. Butler, 178 Mo. 272, 77 S.W. 560 (1903).

¹³¹ Cohen v. United States, 144 F.2d 984 (9th Cir. 1944).

¹³² United States v. Birdsall, 233 U.S. 223 (1914); Daniels v. United States, 17 F.2d 339 (9th Cir.), *cert. denied*, 274 U.S. 744 (1927).

¹³³ Dishow v. Smith, 10 Iowa 212 (1859).

¹³⁴ ACM 10050, Graalum, 19 CMR 667, *pet. denied*, 6 USCMA 812, 19 CMR 413 (1955); CM 313891, Weintraub, 63 BR 317 (1946); People v. O'Neil, 5 N.Y. Cr. 302 (1887).

¹³⁵ Curtis v. State, 113 Ohio St. 187, 148 N.E. 834 (1925).

¹³⁶ ACM 10226, Sax, 19 CMR 826, *pet. denied*, 6 USCMA 822, 19 CMR 413 (1955).

IV. PROBLEMS RELATING TO THE OFFENSES

A. SPECIFICATIONS

The court-martial and the appellate authorities will experience no substantial difficulties with the specification if the accuser is careful, first to determine the proper offense based upon the acts allegedly committed by the accused and, secondly, to allege properly each of the essential elements of the offense. In general, the model specifications contained in Appendix 6c of the Manual do not necessarily delineate the elements of the offenses, which must be determined by substantive law.¹³⁷ Model Specifications 127 and 128, however, are complete in that they include each of the essential elements of bribery and graft as those offenses are described in the *United States Code*.¹³⁸

The failure to allege an element deemed essential in a specification of either bribery or graft does not necessarily result in a failure to allege an offense. In *Holt*,¹³⁹ for example, the corrupt bingo caller was guilty of service discrediting conduct even though his actions were not performed in an official capacity. However, where the accused is in fact occupying an official position as was the accused in *Williams*,¹⁴⁰ who accepted compensation for issuing a military pass, the accuser is negligent if he fails to allege such official position. The result of such a failure is to reduce the crime of graft to a mere disorder.

If an accused has committed an offense of bribery or graft and the evidence reflects that all of the essential elements of one of those offenses are present, he should be charged with a violation of the third category of offenses proscribed by Article 134. If there is doubt as to the applicability of one of the essential elements, as in *Alexander*,¹⁴¹ the accused should be charged with an offense similar to bribery or graft in violation of either the first or second category of offenses proscribed by Article 134. If the evidence is totally lacking as to one of the essential elements, as in *Holt*,¹⁴² the accused should be charged with a simple disorder in violation of Article 134. The particular offense of the accused may be patterned upon Model Specification 127 or 128 whether the principal offense, a similar offense, or a disorder is alleged.

¹³⁷ See ACM 13352, *Williams*, 23 CMR 868 (1957).

¹³⁸ 18 U.S.C. §§ 201-209 (Supp. IV, 1963).

¹³⁹ *United States v. Holt*, 7 USCMA 617, 23 CMR 81 (1957).

¹⁴⁰ ACM 13352, *Williams*, 23 CMR 868 (1957).

¹⁴¹ *United States v. Alexander*, 3 USCMA 346, 12 CMR 102 (1953).

¹⁴² *United States v. Holt*, 7 USCMA 617, 23 CMR 81 (1957).

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The Court of Military Appeals and the boards of review liberally interpret the requirement that each of the essential elements must be pleaded in the specifications alleging the offenses of bribery and graft. A fact alleged in the specification may be sufficient to infer therefrom an essential element. Thus, if it is alleged that the accused's actions were "with respect to declaring Government quarters to be not available," the Government's interest in the matter may be **inferred**.¹⁴³

B. ACCOMPLICES AND VICTIMS

The offenses of bribery and graft are, by their very nature, offenses which are generally committed by more than one person although the offeror alone is guilty in the case of a spurned offer. The reported cases reflect that, in the majority of cases, the corruption of the officials was accomplished with the cooperation of both parties to the transaction. Consequently, it is of importance to determine at trial whether the party other than the accused is an accomplice because his testimony would then be regarded with suspicion.

The established rule is that the giver and receiver of a bribe are accomplices if they have violated the same statute.¹⁴⁴ It may be, however, that the second party to the offense acted through pressure put on by the accused or through some other outside force sufficient to make him a victim rather than an accomplice. The Court of Military Appeals recognizes the established rule but will look to the facts in an unusual case to determine the status of the accused's co-actor. In *United States v. Bey*,¹⁴⁵ the accused platoon sergeant was convicted of having taken money from a trainee in recognition of services rendered, *i.e.*, the issuance of a military pass. The majority of the court was of the opinion that the law officer should have given an instruction to the effect that a conviction cannot be based on the uncorroborated testimony of a purported accomplice if such testimony was self-contradictory, uncertain, or improbable.¹⁴⁶ The members of the Court, however, could not agree whether the accused's co-actor was an accomplice. The Chief Judge, who authored the opinion, expressed the view that the parties were accomplices inasmuch as they violated the same statute, Article 134. Judge Brosman, concurring, did not

¹⁴³ ACM 10226, *Sax*, 19 CMR 826, *pet. denied*, 6 USCMA 822, 19 CMR 413 (1955).

¹⁴⁴ See *United States v. Bey*, 4 USCMA 665, 16 CMR 239 (1954).

¹⁴⁵ *Ibid.*

¹⁴⁶ See MCM, 1951, para. 153a.

deem it necessary to make a distinction between accomplice and victim but agreed with the dissenting Judge that in some ways the trainee was more nearly a victim than a party to the crime. Judge Latimer, dissenting, stated that he could hardly picture the victim trainee, with not over thirty days' service, as being a participant in the crime. The rule of the Court in the *Bey* case ~~has~~ never been challenged and has been cited as authority by at least one board of review.¹⁴⁷

The Court of Military Appeals has effectively ignored an essential part of the established rule it adopted concerning accomplice testimony in bribery and graft cases. The Court justified the use of the rule by indicating that Article 134 was the statute violated by both parties. Although the statement is technically accurate, it results in an unwarranted extension of the established rule by requiring the law officer to give instructions on accomplice testimony even in those cases in which the transgressions of the accused and his co-actor may be based upon violations of different underlying Federal statutes. Such an instruction would not be required from the judge in civilian jurisdictions, from which the rule was adopted.¹⁴⁸

C. CONSPIRACY

It is generally recognized that a bribe giver and a bribe taker cannot be guilty of conspiracy to commit an offense if they are guilty of different crimes.¹⁴⁹ However, if the same statutory provision is violated, the parties may be guilty of a conspiracy to commit bribery or graft.¹⁵⁰ Inasmuch as the Court of Military Appeals has expressed the opinion that the same statute, Article 134, is violated by the giver and the taker,¹⁵¹ it appears that an offense of conspiracy to commit bribery or graft may be alleged against two or more persons regardless of whether the offenses they have committed are based on separate Federal statutes.

Military authorities have long recognized that one may be guilty of the offense of conspiracy to commit bribery or graft.¹⁵² How-

¹⁴⁷ ACM 10191, Allbrook, 20 CMR 580, pet. *denied*, 6 USMA 832, 20 CMR 398 (1955).

¹⁴⁸ See *State v. Sweeney*, 180 Minn. 450, 231 N.W. 225 (1930).

¹⁴⁹ See *United States v. Dietrich*, 126 Fed. 664 (C.C.D. Neb. 1904) (both offenses proscribed by same section of statute). *But cf.* *Downs v. United States*, 3 F.2d 855 (3d Cir.), *cert. denied*, 268 U.S. 689 (1925) (nonofficials found guilty of conspiracy with officials to receive bribe from third parties).

¹⁵⁰ CM 402675, Coogan, 28 CMR 595 (1959), pet. *denied*, 11 USMA 784, 29 CMR 586 (1960).

¹⁵¹ See *United States v. Bey*, 4 USMA 665, 16 CMR 239 (1954).

¹⁵² See CM 328248, Richardson, 77 BR 1 (1948).

ever, the amount of evidence required to prove the overt act required in a conspiracy charge has posed some difficulties. It is not essential that there be direct evidence that the conspirators met and agreed to a corrupt plan or to participate in an offense of bribery or graft. Circumstances which indicate an intelligent and deliberate meeting of the minds of the co-conspirators with intent to commit an offense will suffice to prove the overt act.¹⁵³ If there is a failure on the part of the prosecution to present evidence from which an overt act may be inferred, the accused may be convicted of an offense in violation of the general article if the court finds that his conduct was service discrediting.¹⁵⁴

D. INSTRUCTIONS

Board of review cases decided shortly after the adoption of the *Uniform Code of Military Justice* were not consistent in their holdings with respect to the sufficiency of the instructions required in bribery and graft cases. Where all the elements of the offense were properly alleged in the specification, the boards sometimes held that a simple instruction by the law officer to the effect that "the accused did or failed to do the acts as alleged and the circumstances as specified" was sufficient to inform the court of the elements of the offense.¹⁵⁵ The boards justified these opinions only by finding that the offenses were simple and uncomplicated. Other boards, however, were of the conflicting opinion that instructions which did not spell out each element of the offense were inadequate because the offenses of bribery and graft were not the type of offenses the constituent elements of which are clearly understood by all members of the military service.¹⁵⁶

The Court of Military Appeals has developed the law of instructions required by the law officer to such an extent that the early problems confronting the boards of review have been eliminated. The law officer may no longer merely recite the words of the Manual. He must sufficiently define the elements which must be proven in a given case to afford a fair measuring rod by which the fact finders may properly assess and evaluate the effect of the evi-

¹⁵³ CM 273791, Gould, 47 BR 29 (1945).

¹⁵⁴ CM 328248, Richardson, 77 BR 1 (1948).

¹⁵⁵ See CM 354355, Piercey, 5 CMR 260 (1952); ACM S-2184, McCarson, 4 CMR 546, *pet. denied*, 1 USCMA 721, 4 CMR 173 (1952).

¹⁵⁶ See ACM 5038, Danczak, 5 CMR 785 (1952); ACM 5249, Adren, 7 CMR 602 (1952).

dence.¹⁵⁷ The rule is now firmly established that failure to instruct on each element of an offense is an error of law.¹⁵⁸

The law officer must face the task of deciding exactly what offense was charged by the accuser. If an offense of either bribery or graft is clearly alleged, no difficulty is presented. However, if it appears to him that the accuser has failed to properly allege the principal offense, he must then decide whether an offense similar to or less than bribery or graft is charged and, if so, tailor his instructions to fit the offense. If an appellate agency subsequently determines that the offense intended to be charged was not properly alleged or instructed upon, the instructions will be tested by the standards of a disorder.¹⁵⁹

E. PUNISHMENT

The Table of Maximum Punishments¹⁶⁰ provides that an accused convicted of bribery or graft may be punished by dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor not to exceed three years. A closely related offense, not listed in the Table, is punishable in the same manner.¹⁶¹ A simple disorder, under such circumstances as to bring discredit upon the military service, is punishable by confinement at hard labor for four months and forfeiture of two-thirds pay per month for a period not to exceed four months.¹⁶²

Cases of bribery and graft which have been properly alleged and proven do not cause difficulty because the maximum punishment for these offenses is clearly prescribed. When the specification fails to allege one or more essential elements of the offense, however, or the proof thereof is lacking, the law officer and the appellate authorities are faced with the difficult problem of determining whether the offense is so similar to bribery or graft as to authorize a similar punishment. In *Alexander*,¹⁶³ the Court painstakingly discussed all of the evidence which tended to establish each of the elements required in graft but concluded only by describing the offense as so similar that the authorized punishment for graft was applicable. The Chief Judge, in his dissent, expressed the view that because the evidence failed to establish that

¹⁵⁷ Cf. *United States v. Grossman*, 2 USCMA 406, 9 CMR 36 (1953).

¹⁵⁸ *United States v. Leach*, 5 USCMA 466, 18 CMR 90 (1955).

¹⁵⁹ *United States v. Alexander*, 3 USCMA 346, 12 CMR 102 (1953).

¹⁶⁰ MCM, 1951, para. 127c, Sec. A, at 225.

¹⁶¹ MCM, 1951, para. 127c, at 214.

¹⁶² MCM, 1951, para. 127c, Sec. A, at 225.

¹⁶³ *United States v. Alexander*, 3 USCMA 346, 12 CMR 102 (1953).

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the accused was acting in an official capacity, there remained merely a simple disorder punishable by four months' confinement. In *Bey*,¹⁶⁴ the Court was of the opinion that the accused platoon sergeant who wrongfully received money from a trainee for services rendered was not guilty of bribery because the specification did not allege a corrupt intent but that the offense "smacks of graft, and is punishable as **such**."¹⁶⁵ It must be noted that, in both *Alexander* and *Bey*, all of the essential elements of the offenses of which the accused's convictions were found to be similar were alleged and proven, at least in the Court's opinion. The Court did not specifically state that the imposition of the greater sentence could not be imposed if an essential element of the offense were missing, but it appears that this is their holding. In *Alexander*, the Court found it necessary to cloak with officiality a person who misappropriated a government vehicle and, in *Bey*, found it necessary to identify the offense of the accused as one smacking of graft instead of bribery, in order to sustain the convictions of offenses similar to those which authorized the greater punishment.

The lack of more adequate guidance on the part of the Court has caused confusion among the boards of review. An Army board of review recently held that, although the specifications of graft were inadequate because of a failure to allege the official position of the accused, the resulting disorders were so similar to bribery or graft as to authorize punishment to the same extent as if the offenses had been properly **alleged**.¹⁶⁶ Such a holding, presumably in the accused's favor since the Government has failed in its case, is of small consolation to the accused who is required to undergo the greater punishment. The better rule appears in the more informed reasoning of Air Force boards which hold that, in the absence of an essential element of the offense, the offense stated is no more than a simple disorder punishable by confinement at hard labor for four months and forfeiture for a like period.¹⁶⁷ The Air Force boards have been consistent in holding that it is essential to allege every element of the offenses of bribery and graft in order to sustain a conviction for the offenses.¹⁶⁸ Although

¹⁶⁴ *United States v. Bey*, 4 USCMA 665, 16 CMR 239 (1954).

¹⁶⁵ *Id.* at 673, 16 CMR at 247.

¹⁶⁶ See CM 402675, Coogan, 28 CMR 595 (1959), *pet. denied*, 11 USCMA 784, 29 CMR 586 (1960).

¹⁶⁷ See ACM 13352, Williams, 23 CMR 868 (1957) ; ACM 11615, Hoke, 21 CMR 681 (1956), *pet. denied*, 7 USCMA 765, 21 CMR 340 (1956).

¹⁶⁸ See ACM 5547, Standley, 6 CMR 610 (1952); ACM 5038, Danczak, 5 CMR 785 (1952).

the decisions of the Court of Military Appeals indicate that proof of one or more elements of an offense similar to bribery or graft may be established in a round-about manner, it appears that, in the future, strict proof may be required as to each element of such an offense. This is the view of the Chief Judge who is the only remaining member of the Court who participated in *Alexander* and who dissented therein.

V. SUMMARY AND CONCLUSIONS

An analysis of all the holdings of the United States Court of Military Appeals and the boards of review reflects that those authorities would accept the following definition of the military offense of bribery: the promising, offering, or giving to, or the asking, accepting or receiving by, one occupying an official position or having official duties, of something of value, with the corrupt intent to have influenced the official decision or action of such person, with respect to an official **matter**.¹⁶⁹ The offense of graft does not require a corrupt intent to have an official decision influenced, but it does require the element of unlawful compensation for services rendered or to be rendered.¹⁷⁰

The general purpose of the offenses is to prevent the corruption of public officials, and the purpose of the military offenses is similar. The liberal interpretation of the word official in military cases makes almost every person in the armed forces capable of being a principal to the offenses of bribery and graft. It is appropriate that the terms of the statutes have been liberally interpreted, for the offenses are designed to protect the Government's interest in the transfer of its military personnel, the protection of its property, the procurement of its supplies, and the every day administration of every military unit. The offenses constitute an essential part of military law without which there might be no punishment for those who corrupt official positions.

Although the military offenses of bribery and graft can be accurately defined, it is an unfortunate truism that the offenses have been generally misunderstood by military authorities. Accusers and convening authorities have failed to distinguish the offenses and to use them as they were intended to be used. The Government has not been properly represented in a case where

¹⁶⁹ United **States v. Bey**, 4 USCMA 665, 16 CMR 239 (1954); ACM 1.0060, Graalum, 19 CMR 667, pet. **denied**, 6 USCMA 812, 19 CMR 413 (1956).

¹⁷⁰ ACM 13362, Williams, 23 CMR 868 (1967).

the accused has committed an offense in which all the essential elements of bribery or graft were present, but he was charged instead with **larceny**¹⁷¹ or a disorder in violation of the general **article**.¹⁷² Nor has the United States been properly represented by the accuser and the convening authority in a case which must be reviewed on appeal because an essential element of the offense, which was clearly in evidence, was not alleged in the specification.¹⁷³ A simple understanding of the offenses, of the distinction between bribery and graft, and between those offenses and other related offenses, would insure the proper use of the tools already in existence in military law to combat official corruption in the military services.

Convening authorities and accusers have not had the assistance which they should otherwise expect from opinions of the Court of Military Appeals. On two occasions, the Court considered cases similar to bribery and graft which presented an opportunity to define the offenses, but on both occasions the Court failed to do so. In *Alexander*,¹⁷⁴ the majority of the Court expressed the view that the accused was guilty of an offense similar to graft for punishment purposes but failed to give an adequate definition of the offense of graft. In addition, the Court defined bribery in a negative manner by stating only that that offense was not committed by the accused because an essential element thereof was lacking. Although the majority of the members of the Court hesitated to call the accused's offense graft, they apparently thought it was, for, if they did not, the changing of the name of the accused's offense would have been meaningless. They could simply have found the accused guilty of an offense similar to bribery.

In *Bey*,¹⁷⁵ the Court properly stated that the offense charged was not bribery, as the law officer and counsel believed, because it failed to allege a corrupt intent on the part of the accused. The Court, however, apparently failed to recognize that the offense of graft was properly alleged when they stated :

We consider the offense a serious one. The acceptance of money by a platoon sergeant from a trainee member of his platoon for services in procuring a pass is but little different from acceptance of gifts by a government employee from persons with whom he is transacting official

¹⁷¹ See *United States v. Lyons*, 11 USCMA 68, 28 CMR 292 (1959).

¹⁷² See *United States v. Marker*, 1 USCMA 393, 3 CMR 127 (1952).

¹⁷³ See CM 402675, *Coogan*, 28 CMR 595 (1959), *pet. denied*, 11 USCMA 784, 29 CMR 586 (1960).

¹⁷⁴ *United States v. Alexander*, 3 USCMA 346, 12 CMR 102 (1953).

¹⁷⁵ *United States v. Bey*, 4 USCMA 665, 16 CMR 239 (1954).

business. See: *United States v. Marker*, 1 USCMA 393, 3 CMR 127. Essentially, it smacks of graft and is punishable as such . . .¹⁷⁶

There **was** no need for the Court to equate the offense to graft, or refer to the *Marker* case which was a case of neither bribery nor graft, for the Court was considering a case which in fact alleged the offense of graft and was supported by the evidence presented to the court-martial. The above cases emphasize the failure of the Court to adequately define the offenses of bribery and graft in their proper perspective, thus compounding the confusion which exists in the board of review decisions.

The Court's decisions in the *Alexander* and *Bey* cases are also unsatisfying with respect to their discussions of the authorized punishment for the offenses of which the accused were convicted. If the Court would have recognized the offenses as graft, the issue would be settled. The Court, however, authorized punishment for graft without labelling the offenses as such. A cursory examination of the above decisions might lead one to erroneously assume that the Court is of the opinion that the greater punishment may be imposed in a case in which an essential element of the principal offense is neither alleged nor proven. But this would be an unwarranted interpretation of the Court's decisions. In *Holt*,¹⁷⁷ the Court recognized that the bingo caller was not occupying an official position and could not, therefore, be guilty of either bribery or graft. It is interesting to note that the Court stated Holt's offenses were in certain respects analogous to those in *Alexander* and *Bey*, but it must be emphasized that the sole purpose of so doing was to determine whether Holt's conduct was service discrediting. The Court's opinions in *Alexander* and *Beg* may be justified only by recognizing that the majority satisfied themselves that evidence had been presented to the court-martial concerning each of the essential elements of the offenses which determined the maximum authorized punishment for the accused's conduct. Accordingly, the Court would probably never authorize punishment similar to bribery or graft in a case sounding in either but lacking an essential element thereof. Chief Judge Quinn has expressly stated this opinion in his dissent in *Alexander*. To hold otherwise would render useless the requirement that every element of the offense must be alleged and proved, and would return the military law of bribery and graft to the days when a board of review would

¹⁷⁶ *Id.* at 673, 16 CMR at 247.

¹⁷⁷ *United States v. Holt*, 7 USCMA 617, 23 CMR 81 (1957).

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affirm the conviction of the accused if it appeared that his standard of conduct was less than that of Caesar's wife.¹⁷⁸

Boards of review established by the *Uniform Code of Military Justice* have been less than consistent in their opinions of bribery and graft cases. The inconsistencies are frequently compounded by citing Court of Military Appeals or other board cases as precedent which have no relationship to the particular point under discussion. The decision in an early board of review case, *Standley*,¹⁷⁹ has been cited as authority in virtually every bribery and graft case decided by boards of review since 1953. The specifications in that case alleged all the elements of two offenses of graft, and the law officer properly instructed on the offenses alleged. The board recognized that the offenses alleged and proved were in violation of 18 *United States Code*, section 281,¹⁸⁰ and that a corrupt intent was not an essential element of the offenses charged. The board's opinion was inaccurate, however, in its description of the offenses jointly as bribery and graft, rather than as graft alone. As a consequence, other boards of review have interpreted the opinion in *Standley* to be applicable in both bribery and graft offenses.¹⁸¹ In *Hounshell*,¹⁸² the board, relying on *Standley*, was of the opinion that since a corrupt intent had been alleged, it was a necessary element to be proven. This was indeed a correct statement of the law applicable in *Hounshell*, because bribery was in fact the offense with which the board was concerned. The board failed to realize that the true offense in *Standley* was graft.

The boards of review's failure to properly understand the offenses of bribery and graft is also apparent in *Danczak*,¹⁸³ another frequently cited case. The accused in that case was charged with four offenses alleging that he unlawfully accepted compensation for the performance of official duties. The board properly assumed that, since no corrupt intent was alleged, offenses of bribery were not charged. The board, however, failed to realize that the accused had properly been convicted of graft, and concluded that the offenses were similar to bribery.

¹⁷⁸ See CM 328248, Richardson, 77 BR 1 (1948).

¹⁷⁹ ACM 5547, Standley, 6 CMR 610 (1952).

¹⁸⁰ Now 18 U.S.C. § 203 (Supp. IV, 1963).

¹⁸¹ See ACM 10420, Hounshell, 19 CMR 906, 915 (1955), reviewed on other offenses, 7 USCMA 3, 21 CMR 129 (1956).

¹⁸² *Ibid.*

¹⁸³ ACM 5038, Danczak, 5 CMR 785 (1952).

BRIBERY AND GRAFT

The **inartful** use of words by boards of review is sometimes responsible for confusion among those who rely upon their decisions for guidance. In *Adren*,¹⁸⁴ for example, the board referred to the accused's transgressions as follows :

. . . the offenses of offering and giving bribes to others, the first offense with intent to influence the action of that person . . . and the second the payment of money as compensation for services to be rendered . . .¹⁸⁵

An accurate description of the accused's offenses would have been simply one of bribery and one of graft. The board, however, described both offenses as bribery and, having properly identified the first of the offenses, used language which was superfluous in that it described an element without which there could have been no bribery.

The many inconsistencies which have arisen in the military cases of bribery and graft might lead one to wrongfully infer that the basis of the difficulty rests upon some complicated reason incapable of an easy solution. However, the root of the difficulty stems merely from the lack of information contained in authoritative sources. The *Uniform Code of Military Justice* does not specifically prohibit the offenses and the Manual does not define them. Consequently, military appellate authorities have been required to refer frequently to other sources for a definition of the offenses.

The paucity of information pertaining to the military offenses of bribery and graft has resulted in an unwarranted reliance upon the Model Specifications contained in Appendix 6c of the Manual. Accusers have depended upon them in drafting charges; law officers have depended upon them in drafting instructions; and appellate authorities have depended upon them for a definition of the essential elements of the offense. The result has been confusion because, unfortunately, the Model Specifications are inartfully drawn.

The two Model Specifications under the heading bribery and graft are essentially the same, differing only in that the first is applicable to one who unlawfully asks, accepts, or receives a thing of value whereas the second is applicable to one who unlawfully promises, offers, or gives a thing of value. This is a false classification because the distinction between the offenses is not the receiving and the giving of the thing of value. The

¹⁸⁴ ACM 5249, *Adren*, 7 CMR 602 (1952).

¹⁸⁵ *Id.* at 603.

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elements which actually distinguish the offenses from one another are unfortunately contained in each of the Model Specifications. Accordingly, unless one is aware of the distinction between the offenses, a distinction which cannot be arrived at by a quick reference to the reported cases, the Model Specifications will not furnish the required assistance in determining the essential elements of the offense committed.

Bribery and graft are jointly named in the title under which the Model Specifications appear. This fact, in and of itself, tends to lead astray the accuser and the convening authority by indicating that the terms may be synonymous. The only other offenses jointly listed in Appendix 6c of the Manual are rape and carnal knowledge,¹⁸⁶ but the elements of these offenses are clearly separated by alternate phrases containing the names of the offenses. Accordingly, it is not to be unexpected that an accuser or even a convening authority will sometimes fail to appreciate the distinction between the offenses of bribery and graft.

It is essential to the administration of military law that a clear and precise description of the military offenses of bribery and graft be included in the Manual. The most effective method of achieving this objective is to substitute for the Model Specifications now contained in Appendix 6c of the Manual model specifications applicable to bribery and graft separately which would clearly delineate the elements of each of the offenses.¹⁸⁷ The accuser will then be able to properly pattern a specification appropriate to the facts of the case before him. It should be noted that the great majority of bribery and graft cases decided by the boards of review would probably never have reached a contested stage on appeal if the Model Specifications in the Manual would have been originally drafted as here proposed.

¹⁸⁶ MCM, 1951, app. 6c, at 484.

¹⁸⁷ See appendix to the article for the author's recommended specifications.

BRIBERY AND GRAFT

APPENDIX

RECOMMENDED SPECIFICATIONS

127 *Bribery:*

a. Asking, etc.

In that _____, being at the time (a contracting officer for _____) (the personnel officer of _____) (_____), did, (at) (on board) _____, on or about _____ 19____, wrongfully and unlawfully (ask) (accept) (receive) from _____, (a contracting company engaged in _____) (_____), (the sum of \$_____) (_____, of a value of about \$_____) (_____), with intent to have his (decision) (action) influenced with respect to an official matter in which the United States was and is interested, to wit: (the purchasing of military supplies from _____) (the transfer of _____ to duty with _____) (_____).

b. Promising, etc.

In that _____ did, (at) (on board) _____, on or about _____ 19____, wrongfully and unlawfully (promise) (offer) (give) to _____ (his commanding officer) (the claims officer of _____) (_____), (the sum of \$_____) (_____, of a value of about \$_____) (_____), with intent to influence the (decision) (action) of the said _____ with respect to an official matter in which the United States was and is interested, to wit: (the granting of leave to _____) (the processing of a claim against the United States in favor of _____) (_____).

128 *Graft:*

a. Asking, etc.

In that _____, being at the time (a contracting officer for _____) (the personnel officer of _____) (_____), did, (at) (on board) _____, on or about _____ 19____, wrongfully and unlawfully (ask) (accept) (receive) from _____, (a contracting company engaged in _____) (_____), (the sum of \$_____) (_____, of a value of about \$_____) (_____), (as compensation for) (in recognition of) services (rendered) (to be rendered) (rendered and to be rendered) by him the said _____ in relation to an official matter in which the United States was and is interested, to wit: (the purchasing of military supplies from _____) (the transfer of _____ to duty with _____) (_____).

b. Promising, etc.

In that _____ did, (at) (on board) _____ on or about _____ 19____, wrongfully and unlawfully (promise) (offer) (give) to _____, (his commanding officer) (the claims officer of _____) (_____), (the sum of \$_____) (_____, of a value of about \$_____) (_____), (as compensation for) (in recognition of) services (rendered) (to be rendered) (rendered and to be rendered) by the said _____ in relation to an official matter in which the United States was and is interested, to wit: (the granting of leave to _____) (the processing of a claim against the United States in favor of _____) (_____).

AN INTRODUCTION TO MILITARY JUSTICE IN FRANCE*

BY GERALD L. KOCK**

I. ORIGINS AND COMMON DEVELOPMENT¹

In their feudal origins the French and Anglo-Norman systems of military justice were identical.² The officer who was the king's principal military agent, whether it was seneschal, constable, general, or marshal, had, in addition to his command responsibilities, judicial authority in the armed force.³ This authority extended to summary proceedings "to punysh all manner of men that breken the statutes and ordonnaunce by the King made to be keped in the [Army]."⁴ The ordinances thus enforced were, as a rule, estab-

* This article is adapted from the author's introduction to his translation of the French *Code of Military Justice*. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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¹ This article will not deal with the steps in a military prosecution or a comparison of American military and civilian practice, because both of these things have been done so admirably by Judge Latimer in his article in 29 TEMPLE LAW QUARTERLY 1 (1955). Also, no attempt is made here to compare American practices with those in France. For a general comparative sketch, see Rheinstein, *Comparative Military Justice*, 15 FED. B. J. 276 (1955). For a comparison of American and British systems, see Pasley, *Comparative Study of Military Justice Reforms*, 6 VAND. L. REV. 305 (1953).

² Military legend and John Adams notwithstanding, there is no apparent connection between anything the Greeks and Romans may have done and courts-martial. Until the seventeenth century, the similarity seems to have been in the notion that the military commander in the field was simply an extension of the sovereign, with all the powers of that office. See, e.g., 4 TACITUS, HISTORY § 25, at 154-155 (Church transl., 2d ed. 1873); 6 POLYBIUS, HISTORIES §§ 37-38, at 489-491 (Shuckburgh transl. 1889); WALBANK, HISTORICAL COMMENTARY ON POLYBIUS (1957). See generally, BRAY, *ESSAI SUR LE DROIT PENAL MILITAIRE DES ROMAINS*, ch. IV (1894); GIRARD, *HISTOIRE DE L'ORGANISATION JUDICAIRE DES ROMAINS* 317-328 (1901).

³ WINTHROP, *MILITARY LAW AND PRECEDENTS* 45 (2d ed. 1895); see 1 HOLDSWORTH, *HISTORY OF ENGLISH LAW* 573-78 (3d. rev. ed. 1922).

⁴ 1 BLACK BOOK OF THE ADMIRALTY 281 (Twiss, 1871). Squibb's research into the origins of the Court of Chivalry (successor to the Court of the Constable and Marshal) has shown that the attempts by WINTHROP, *op. cit. supra* note 3, at 49, 2 BRITISH WAR OFFICE, *MANUAL OF MILITARY LAW* [hereinafter cited as *BRIT. MANUAL*] § I, at 1, 4 (1960), and Holdsworth, *Martial Law Historically Considered*, 18 LAW Q. REV. 117 (1902), to find institutional

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lished for the governance of the troops as they set out upon each expedition.⁵ As the occasional army of the feudal period gave way to the standing armies of later times, the early ordinances developed into more or less stable articles or ordinances of war. By the seventeenth century the practice had changed from the summary proceedings of the earlier period to trial before a board of officers commissioned to render justice.⁶ These boards were indiscriminately labeled war councils, courts-martial, or courts **military**.⁷

The development of military justice institutions for the professional (mercenary) armies of the period continued in the same vein in France and in England until the French Revolution.⁸ Then the new ideas of equality and fraternity forced a new direction in France. It was the duty of all citizens to serve.⁹ The citizen soldier took a view of his rights and privileges that was quite different from that of the professional. While the latter put up with discipline and authority as a part of the job for which he was paid, the former was jealous of his rights as a citizen and saw no reason to surrender any of them to one who was only a brother to himself. The conscript army created to meet the special problems of republican France needed a different kind of justice, and, in response to this need, French military law took a direction of its own.¹⁰

origins for courts-martial are unfounded. It is quite clear that at the beginning what was envisaged was no more than a delegation, by commission, of the King's prerogative to punish summarily any and all offenders in his armed force. SQUIBB, *THE HIGH COURT OF CHIVALRY* (1959). For the development, in France, of the *Tribunal de la Connetablie et Marehaussee de France*, see MITCHELL, *THE COURT OF THE CONNETABLIE* (1947).

⁵ See WINTHROP, *op. cit. supra* note 3, at 1411, for an ordinance of Richard I addressed "to all his subjects about to proceed by sea to Jerusalem." We see as early as the ninth year of Richard II, though, a set of articles of war ordained by the King on the advice of his great men for application "in the army." WINTHROP, *op. cit. supra* note 3, at 1412.

⁶ WINTHROP, *op. cit. supra* note 3, at 18; 2 BRIT. MANUAL § I, at 6 (1961).

⁷ *Zbid.*

⁸ The parliamentary rebellion (1640-1660) did not lead to the same attitude toward the old ways as did the French Revolution later. The parliamentary and Commonwealth forces were governed by articles much like those operative for the Royalist forces. See *id.* at 3.

⁹ This is still a part of the French view of full democratic citizenship. See Mesnard, *National Security and France*, 241 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 160 (1945).

¹⁰ See pp. 126-29 *infra*.

11. THE DEVELOPMENT OF MILITARY JUSTICE IN GREAT BRITAIN AND THE UNITED STATES

A. THE ARTICLES OF WAR

In England, after the "glorious Revolution," what had begun as a crown prerogative in war areas developed into a statutory power over armed forces everywhere." The councils of war common to the English and French systems became the courts-martial of the Anglo-American tradition. The change was one of name rather than of substance and probably grew partly out of a faulty analogy from martial law and partly from a desire to simplify matters by using the same forms for both the military and martial branches of the military jurisdiction.¹² In 1640 compulsory military service was declared illegal by statute,¹³ and the army of professionals continued to be the rule until World War II.¹⁴ It is from that tradition that American military justice has been drawn.

At the outbreak of war in 1775, the Continental Congress adopted the first American articles of war.¹⁵ In 1776, the articles were revised with the result that they became almost a copy of the articles of war then in force among the British.¹⁶ The articles of 1776 (with some amendments) were continued in force under the new constitution until 1806,¹⁷ when modifications appropriate to conform them to the new form of government were adopted.¹⁸ Further revisions of the articles of war were effected after the Civil War,¹⁹ World War I,²⁰ and World War II.²¹ The last of these

¹² 2 BRIT. MANUAL § I, at 6-11.

¹³ See *Winthrop, op. cit. supra* note 3, at 1; 2 BRIT. MANUAL § I, at 1; MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951 [hereinafter cited as MCM, 1951 1].

¹⁴ 16 Car I ch. 28 (1640).

¹⁵ SLACK, LIABILITY FOR NATIONAL SERVICE 2 (1942).

¹⁶ 2 JOURNALS OF THE CONTINENTAL CONGRESS 111 (1905).

¹⁷ 5 JOURNALS OF THE CONTINENTAL CONGRESS 788 (1960). John Adams reported in his *Autobiography* that he "was for reporting the British articles of war *totidem verbis* The British articles of war were, accordingly, reported, and defended in Congress by me assisted by some others, and finally carried." 3 ADAMS, WORKS 68-69 (1851).

¹⁸ See WINTHROP, *op. cit. supra* note 3, at 14 n.43, for a list of acts continuing these articles in force.

¹⁹ For an enlightening discussion of the constitutional provisions for the war powers of Congress, see 1 CROSSKEY, POLITICS AND THE CONSTITUTION 413-15, 422-25 (1953).

²⁰ 18 Stat. 228 (1874).

²¹ 41 Stat. 787 (1920).

²² 62 Stat. 627 (1948); 64 Stat. 108 (1948), reenacted with only formal changes as Chapter 47, Title 10, UNITED STATES CODE, 70A Stat. 36 (1956).

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revisions is that now in force, the *Uniform Code of Military Justice*, which was enacted for all the armed forces of the United States.

Except during World War I the British and American armies remained professional armies until the outbreak of World War II. Not having a need to police colonial possessions the United States maintained only a small number of men under arms.²² In the years after the American Revolution the United States had a very small national army, reliance being had almost entirely on state militia to provide whatever forces were needed to maintain the peace and restrain the Indians.²³ The militia were called to serve for such short periods and were, apparently, so little subjected to discipline that military justice gained no notice.²⁴ The sudden expansion of arms after 1940 brought military discipline to nearly every household in the United States. Even men who had no immediate contact with military justice became aware of the ways in which it differed from civilian justice. Rumor invented even more differences. As the pace of war slowed and popular involvement in the good cause receded, attention was more and more directed to ways in which the war machine fell short of civilian ideals.²⁵

B. *THE UNIFORM CODE OF MILITARY JUSTICE*

As a result of the widespread concern with failings of military justice, studies of the court-martial system were undertaken both in Congress and within the National Military Establishment.²⁶ In 1948, Congress amended the articles of war in an attempt to cure some of the abuses that had been exposed,²⁷ and the executive branch rewrote the *Manual for Courts-Martial*²⁸ to account for the statutory changes and also to correct other flaws revealed in the twenty years the old manual had been in use.²⁹ Further study of military justice was undertaken within the National Military Es-

²² Until 1940 the authorized strength of the army was under 300,000 men, except during World War I.

²³ See 2 MARSHALL, *LIFE OF GEORGE WASHINGTON* 218-26 (2d ed. 1836); EKIRCA, *THE CIVILIAN AND MILITARY* 46-47, 156-75 (1956).

²⁴ See, e.g., EKIRCH, op. cit. supra note 23, at 38-9.

²⁵ See, e.g., the items listed in Walstein, *Revision of the Court-Martial System*, 48 COLUM. L. REV. 219 n.1 (1948).

²⁶ Predecessor of the Department of Defense.

²⁷ See Walstein, supra note 25, at 219, 221-231.

²⁸ Executive Order 10020, *MANUAL FOR COURTS-MARTIAL*, U. S. ARMY, 1949, at ix.

²⁹ *Introduction*, *MANUAL FOR COURTS-MARTIAL*, U. S. ARMY, 1949.

tablishment. The Secretary of Defense appointed a committee of military personnel with a civilian chairman to study the system and make recommendations.³⁰ In line with the effort that was then going into a unification of the armed forces, the committee³¹ produced a draft of a code of military justice that was to replace the three different bodies of law then used by the United States' armed forces.³² That draft became the *Uniform Code of Military Justice*.

There was a good deal of doubt among the officers charged with maintaining an effective armed force whether the civilianizing provisions of the new code left the commander with effective control of the organization for whose performance he was responsible.³³ The court-martial system had existed as long as it had outside the usually considered necessary procedural scheme largely because of recognized need that the commander who is responsible for results in armed conflict must have an almost unfettered hand in dealing with those within his command.³⁴ What the code has helped to impress upon these officers is that, since in these days of mass warfare the professional force cannot do its job without substantial aid from the manpower resources of the civilian segment of the population, the traditional notions of command are no longer sufficient. Still the military commander with regard to the professional troops, he has become, in addition, a supervisor of civilian manpower who are serving temporarily with the military arm.³⁵ They remain civilians whether in uniform or not. Oaths of office do not change the outlook of these men or, except to a very limited extent, reconcile them to the restrictions on their normal activities that even temporary service requires. After a period of massive induction of such men, there exists a large group of men who are in a position to exert a tremendous influence upon the position of the military vis à vis the people and their legislatures. They can be expected to feel a need for, and are in a position to achieve, a military justice more like the jus-

³⁰ See Morgan, *Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169, 173 (1953).

³¹ The committee was aided by a staff of fifteen service and civilian lawyers who processed all materials. *Zbid.*

³² ARTICLES FOR THE GOVERNMENT OF THE NAVY; DISCIPLINARY LAWS OF THE COAST GUARD; ARTICLES OF WAR (Army and Air Force).

³³ See, e.g., Ward, *UCMJ—Does It Work?*, 6 VAND. L. REV. 186 (1953).

³⁴ See EVERETT, *MILITARY JUSTICE UNDER THE UNIFORM CODE OF MILITARY JUSTICE*, ch. 1 (1956).

³⁵ With reference to the increasingly civilian complexion of modern armed forces, see Latimer, *Comparative Analysis of Federal and Military Criminal Procedure*, 29 TEMP. L. Q. 1 (1955).

tice that is, in theory at least, available to them in their civilian status.³⁶

Such was the background to the enactment of the *Uniform Code*. One can see the same forces at work in current talk of changes in courts-martial; but, for the present, calls for change strike a less urgent note, because the Court of Military Appeals, created in 1950,³⁷ has done much to alleviate the divergences of military justice from the civilian law that is subject to constitutional restraints.³⁸

As might be expected of a system of law originally designed to be applied only within forces in the field, the Anglo-American court-martial scheme was set up to meet the mobility requirements of an army in the course of operations. The scheme is so constructed that as little time and manpower as possible are expended for its operation. In order to do this, Anglo-American court-martial law has traditionally provided different courts for the trial of offenses, depending upon the severity of the punishment that can be imposed. This was true in 1775 when the United States adopted the British system and remains true today.³⁹ Under the *Uniform Code of Military Justice* there are three kinds of courts: Summary, consisting of one officer;⁴⁰ Special, consisting of at least three officers and trial and defense counsel;⁴¹ and General, consisting of at least five officers and a law officer and trial and defense counsel.⁴² The jurisdiction of each of these courts is defined in terms of the punishments it may adjudge; all have jurisdiction to try any person subject to court-martial law⁴³ for

³⁶ See Walstein, *Revision of the Court-Martial System*, 48 COLUM. L. REV. 219, 234-36 (1948); EVERETT, *op. cit. supra* note 34, at 11.

³⁷ UNIFORM CODE OF MILITARY JUSTICE [hereinafter cited as UCMJ] art. 67.

³⁸ See, e.g., Note, *Survey of the Law: Military Justice*, 3 MIL L. REV. 67 (1959); Schiesser and Barrett, *A Supplement to the Survey of Military Justice*, 24 MIL. L. REV. 125 (1964), and additional supplements cited therein at 125 n.1.

³⁹ WINTHROP, *op. cit. supra* note 3, at 64.

⁴⁰ UCMJ arts. 16, 20.

⁴¹ UCMJ arts. 16, 19, 27.

⁴² UCMJ arts. 16, 26, 27. See Wiener, *The Army's Field Judiciary System*, 46 A.B.A.J. 1178 (1960), for a discussion of the work of the law officers assigned to general courts-martial and the development of this protection for the accused.

⁴³ Courts are usually established in each operating unit (division, regiment, separate battalion). It is not usual for a member of one unit or service to be tried by a court convened by a commander in another unit or service. See MCM, 1951, para. 13. The jurisdiction of summary courts is more limited. See UCMJ art. 20.

any offense set out in the Code.⁴⁴ The courts may sit at any time and in any place but may try only those persons listed in articles 2, 3, and 4 of the Code.

Courts-martial have jurisdiction to try members of the armed forces from the time of their entry into the force to the time of discharge.⁴⁵ Reserve personnel ordered to active duty are subject to military jurisdiction from the time they are ordered to report for duty.⁴⁶ The *Uniform code* provides that certain civilians may be tried by courts-martial,⁴⁷ but the effect of these provisions of the Code is in considerable doubt. The Supreme Court has ruled that Congress' power to subject persons to military justice depends upon the military status of those so treated. The most recent cases⁴⁸ leave it unlikely that court-martial jurisdiction can, in time of peace, be exercised over anyone who is not a member of an armed force. The court has not indicated a change from its earlier ruling⁴⁹ that to subject civilians to military law in time of war, at least during military occupation, is not objectionable.

Courts-martial may try persons only for offenses set out in the Code.⁵⁰ These offenses include the usual military offenses, *e.g.*, absence without leave, insubordination, and many offenses that are punished in the civilian courts as well, *e.g.*, murder, rape, theft.⁵¹ In addition to the specific offenses provided by the Code, it is also provided that persons subject to court-martial may be tried for "conduct of a nature to bring discredit upon the armed

⁴⁴ UCMJ arts. 18, 19.

⁴⁵ UCMJ art. 2(1), (2). Material contained in the balance of this section can be found more searchingly discussed in EVERETT, *op. cit. supra* note 34.

⁴⁶ UCMJ art. 2(1). See also UCMJ art. 2(3)-(9).

⁴⁷ UCMJ arts. 2(10)-(12), 3: Persons serving with or accompanying an armed force in the field in time of war; persons serving with, employed by or accompanying the armed forces outside the United States; persons within areas under control of the armed forces secretaries, persons having been discharged after commission of a serious offense but before trial.

⁴⁸ *Kinsella v. Singleton*, 361 U.S. 245 (1960); *McElroy v. Guagliardo*, 361 U.S. 281 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960). The impact of these cases is interestingly discussed in Comment, *Elimination of Peacetime Court-Martial Jurisdiction Over Military Dependents and Employees in Foreign Countries*, 20 LA. L. REV. 714 (1960). For a review of the history of United States court-martial jurisdiction over civilians, see Comment, 9 DEPAUL L. REV. 197 (1960).

⁴⁹ *Madsen v. Kinsella*, 343 U.S. 341 (1952).

⁵⁰ UCMJ art. 77-134.

⁵¹ The necessity for civil offenses is a product of the federal system. Since most criminal law is state, not national law, and since state law does not as a rule govern military reservations, even within the states, and never runs beyond the state's boundaries there would often be no punishment for murder, rape, or such offenses in the absence of these articles of the Code.

forces.”⁵² This provision is used to punish by court-martial persons who violate state or federal laws who could not otherwise be tried except in the civilian courts.⁵³ The Court of Military Appeals has ruled, however, that this section cannot be used to support trial for a capital offense; capital offenses not specifically provided for in the *Uniform Code of Military Justice* must be tried in the ordinary civilian courts.⁵⁴

III. THE EUROPEAN APPROACH—FRANCE A. HISTORICAL DEVELOPMENT

From early in their development courts-martial have maintained two faces. In addition to being successors to the sovereign's power to suppress the unruly rabble that too often constituted the soldiery these courts came to be courts of honor wherein members of the officer corps were called to account for disappointment of group expectations or acts reflecting adversely upon the high regard in which it was felt the outside world ought to hold the group. From this double aspect have come the traditionally opposed ways of looking at court-martial justice. The professional officer corps, anxious to maintain the corps as a self-disciplining group, has opposed any changes that would make an opening for interference by outsiders. The soldiery, on the other hand, have had a persistent interest in whatever outside protection they could find against the seeming harshness of officer-justice.⁵⁵ While armies were mainly professional they were small, or, as in the case of the true mercenaries, fragmented so that there was almost no voice for the concern of the enlisted man. The officer corps, often members of a politically powerful class, did not suffer the same disability.

The course of political history was to change the orientation of influence. Building upon the special *esprit* born of revolution the universal service of revolutionary France might well have been a unique experience had Napoleon not at Tilsit planted seeds for its extension.⁵⁶ Having had her force under arms severely limited,

⁵² UCMJ art. 134. See Hagan, *The General Article—Elemental Confusion*, 10 MIL. L. REV. 63 (1960). See also Nichols, *The Devil's Article*, 22 MIL. L. REV. 111 (1963).

⁵³ In addition the third clause of article 134 (UCMJ) expressly provides court-martial jurisdiction for non-capital federal offenses.

⁵⁴ *United States v. French*, 10 USCMA 171, 27 CMR 245 (1959).

⁵⁵ Walstein, *Revision of the Court-Martial System*, 48 COLUM. L. REV. 219, 229-31 (1948).

⁵⁶ See Graham, *Universal Military Training in Modern History*, 241 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 8 (1945).

Prussia was directed to the potential that lay in having everyone trained at least a little bit.⁵⁷ From these two sources universal military training grew to be the rule throughout Europe. The significance to us here of the growth of universal conscription is that it made entire populations beneficiaries, or victims, of military justice.⁵⁸ The change elsewhere was slower than in revolutionary France and was attended by less of the noisy emotionalism of that period, but as whole populations fell within the military sphere an increasing dissatisfaction was felt with the justice that prevailed there. In time, military justice nearly everywhere was subject to forms designed to reproduce an appearance of existing civilian institutions. Where civilian institutions were not copied, great care was taken to eliminate the dangers that were seen in the predominance of the officer class.⁵⁹

The English and American revolutionary movements were not egalitarian in sentiment and so did not lead to the change noted in continental Europe, but France was at the core of the rebellion against the old ways. The almost total disorganization of the military forces that came as the revolution progressed left a chaos that took several years to quiet. In 1796 the Directory adopted the *Code des délits et des peines pour les troupes de la République* and created permanent councils of war to take the place of the civilian courts for the punishment of offenders under the rules set out in the code.⁶⁰ Napoleon, while First Consul, undertook to reform the organization of military justice, but because of the almost permanent state of war, had only succeeded in overlaying the system with a complex of partial reform measures by the time the Empire fell. After the restoration (1814–1830) and under the July monarchy (1830) and the Second Empire (1851–1871) hopes to effect

⁵⁷ See Field Marshal Earl Wavell's discussion at 12 *NEW CAMBRIDGE MODERN HISTORY* 255–56 (1960).

⁵⁸ "The militarism of Carnot and the Jacobins was based on the revolutionary principle of 'the nation in arms.' It meant a large army of eager young conscripted citizens in place of a relatively small army of older and more easygoing professional soldiers, and a staff of officers whose position depended on merit rather than on birth. It was itself quite revolutionary. It broke utterly with the military traditions of monarchical France and all other countries of the time." 1 HAYES, *POLITICAL AND CULTURAL HISTORY OF MODERN EUROPE* 633 (1932). For a discussion of broader effects of the nation in arms, see MORGENTHAU, *POLITICS AMONG NATIONS* 287–395 (1953).

⁵⁹ See, for example, the Swiss system described in Rheinstein, *Comparative Military Justice*, 15 *FED. B. J.* 276, 278 (1955).

⁶⁰ Laws of 13 and 21 brumaire an V. For a careful outline of the historical development of French military justice, see Poittevin, [1923] *REVUE DE DROIT PENAL* 750.

a thorough reform continued, but the political instability of the time and the constant pressure of military preparedness lead to continued use of the same system until 1857 when the first *Code de justice militaire* was enacted. The new code retained the councils of war, however, and so was not enough of a change to suit either a citizenry devoted to libertarian slogans or an army made up largely of short term conscripts. After only a few years the cry for reform was heard again.

B. THE PRESENT CODE OF MILITARY JUSTICE

French military justice is now regulated by the third code established for that purpose since the revolution. The present code of military justice was the result of reform movements begun as early as 1872 but not widely supported until the country was shaken by the revelations of the Dreyfus affair at the turn of the century (1896–1906). War and recovery from war caused postponements until 1928. The new code⁶¹ was written to make military justice as limited in application as possible and, when applied, as much like civilian justice as possible.⁶²

The 1928 law⁶³ provides for permanent armed forces tribunals which have jurisdiction to try military personnel, persons who are assimilated to the military law, and persons charged with offenses against the security of the State.⁶⁴ These personnel may be tried by these tribunals only for military offenses, set out in Book Two of

⁶¹ Code de justice militaire pour l'armée de terre, law of 9 March 1928. Though the naval code was not reformed for ten more years, the punishments applicable were reduced in severity by the provisions of this code. See Article 274.

⁶² For a description of the civilian courts and of proceedings conducted in them, see the author's comment, *Machinery of Law Administration in France*, 108 U. PA. L. REV. 366 (1960). See also THE FRENCH CODE OF CRIMINAL PROCEDURE, 7 AMERICAN SERIES OF FOREIGN PENAL CODES (Kock transl. 1964).

⁶³ As amended by decree of 22 September 1953.

⁶⁴ Article 30 of the Ordinance of 7 January 1959 provides that all persons called under the selective service system to perform civilian rather than military services are assimilated to military personnel, and article 5 of the Decree of 15 October 1951 makes the code applicable to female as well as male military personnel.

Military jurisdiction over the third category, persons charged with offenses against the security of the State, has been transferred during peacetime by a 1963 amendment to the *Code of Criminal Procedure* to a new "Court for the Security of the State." See Kock, *A New Approach to National Security in France*, 12 AM. J. COMP. L. 265, 266 (1963).

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the Code,⁶⁵ and other offenses if they are committed on duty or at a military establishment. In the latter cases the penalties applied are those provided by the Penal Code.⁶⁶

C. OPERATION OF MILITARY JUSTICE IN TIME OF PEACE

The armed forces tribunals are composed of a mixed bench consisting of one civilian judge and six military judges chosen from among the personnel assigned to the military region for which the court sits.⁶⁷ The judges are chosen so that their rank varies with that of the accused.⁶⁸ Official counsel⁶⁹ and clerk's office personnel⁷⁰ are attached to the military courts where they do the same work as the equivalent officers of the civil courts. The government commissioners, who are the equivalent of the civilian prosecuting attorneys, and the military examining magistrates must be qualified judicial personnel, and they constitute a separate service independent of command authority in the performance of their duties.⁷¹

⁶⁵ Offenses set out in Book Two of the code are classified under the following headings: Breaches of duty and military discipline, failure to report and desertion, rebellion and insubordination, abuse of authority, misappropriation of military goods, destruction of military buildings and materiel, violation of orders, self-mutilation, refusal to participate in judicial proceedings, surrender, treason and espionage, wrongful assumption of uniforms or insignia, miscellaneous offenses.

⁶⁶ CODE OF MILITARY JUSTICE art. 2. By way of exception to the general rule, article 254 provides that where the penal code calls for a penalty in the form of a fine the military tribunal may substitute from two to six months in jail.

⁶⁷ Metropolitan France is divided into nine military regions. Headquarters of the regions are in Paris, Lille, Rennes, Bordeaux, Toulouse, Metz, Dijon, Lyon, and Marseille. Administrative Decree of 15 April 1958.

⁶⁸ For the trial of enlisted men the military judges on the court consist of one colonel or lieutenant colonel, one battalion commander or major, one captain, one first lieutenant, one second lieutenant, and one noncommissioned officer. For the trial of an officer the court consists of two judges of the same grade as the accused and four having higher grades. CODE OF MILITARY JUSTICE art. 10.

⁶⁹ Official counsel (the *ministere public*) are assigned to all but the lowest of the French civil courts.

⁷⁰ Every French court, civilian and military, has attached to it a clerk's office (*greffe*) manned by one clerk of court and as many assistant clerks as are needed for the work of the office. These men maintain the court's files and at least one of them must attend every session of the court and prepare the record of the proceedings. The record of all proceedings and every judgment rendered must bear the signature of a member of the clerk's office staff as proof of their authenticity.

⁷¹ CODE OF MILITARY JUSTICE arts. 13, 14, 15.

1. *Before Trial.*

The Examining Magistrate. The first step in the prosecution of a military offender is the issuance of an order for investigation by the general commanding the military region.⁷² That order fixes the content of the government commissioner's initial application to the examining magistrate.⁷³ The government commissioner's application is the only ground for an exercise of jurisdiction by the military examining magistrate.⁷⁴ The military magistrate does not have the freedom of action enjoyed by his civilian counterpart. Once he has jurisdiction, the civil magistrate may extend his investigation to include all related offenses that may come to light and all persons who appear to him to be implicated,⁷⁵ but the military magistrate is strictly limited to the offense and persons named in the order for investigation. Should he discover other offenses, or that other persons are involved, he can only report his findings to the general who issued the order for investigation.⁷⁶ That officer then decides whether further investigation is appropriate.

If in the course of his investigation the examining magistrate finds that the case is one over which the military authorities have no jurisdiction, he must order the record of his investigation transmitted to the general who ordered the investigation so that that officer may forward the case to the appropriate civilian authorities.?? If the general decides to transmit the case to the civil authorities they remain free to deal with the case as they see fit—even ignore it altogether. In this they have much more freedom than has the military authority in the reverse situation. When a civilian authority transmits a case to the commanding general of a military region because the civil courts have no jurisdiction, the general must order a judicial investigation.⁷⁸

Conflicting claims to jurisdiction, whether between two military courts or between one military and one civil court, are decided by the criminal chamber of the Court of Cassation.⁷⁹ That chamber also has jurisdiction to transfer a case from one judge or court to another if (1) the proper court cannot be legally constituted, (2)

⁷² CODE OF MILITARY JUSTICE arts. 24, 40.

⁷³ CODE OF MILITARY JUSTICE art. 42a.

⁷⁴ CODE OF MILITARY JUSTICE art. 8.

⁷⁵ CODE OF CRIMINAL PROCEDURE art. 81.

⁷⁶ CODE OF MILITARY JUSTICE arts. 61, 62.

⁷⁷ CODE OF MILITARY JUSTICE art. 66.

⁷⁸ CODE OF MILITARY JUSTICE art. 24.

⁷⁹ CODE OF MILITARY JUSTICE art. 117.

the course of justice has for some reason been interrupted, **or (3)** there is reason to believe that otherwise a fair trial of the case cannot be had.⁸⁰

If at the conclusion of his investigation the examining **magistrate** decides that the act charged does not constitute an offense or that there are not sufficient charges to justify trial, he renders an order closing the **case**.⁸¹ That order must be executed by the general who ordered the investigation, but the accused may, thereafter, be punished for any breach of disciplinary regulations that may have been **committed**.⁸² It should be noted here that, while military courts have jurisdiction to try any offense, violations are usually handled as disciplinary problems. Up to sixty days' confinement may be imposed as a disciplinary penalty without judicial **intervention**.⁸³

If the examining magistrate finds that the case is appropriate for trial as a misdemeanor, he orders it transferred to a permanent armed forces tribunal for trial. If a felony is involved, the case must be transferred to the indicting chamber of the local civilian court of appeal.

Appeals may be taken from orders of the examining magistrate to the indicting chamber of the court of **appeal**,⁸⁴ specially composed for military **cases**.⁸⁵ The government commissioner and the general who ordered the investigation may appeal from any order. The accused may appeal only on the grounds that the military examining magistrate did not have jurisdiction, that the act charged is not an offense, or that the government commissioner did not participate in the proceedings.⁸⁶

The Indicting Chamber. At the indicting chamber of the court of appeal the case is in the charge of the attorney general ⁸⁷ regularly assigned to that court and is conducted in the same way as is a civilian prosecution. The court is differently composed for military cases, however. One of the three civilian appellate judges is replaced by a military officer of the rank of colonel or lieutenant

⁸⁰ CODE OF MILITARY JUSTICE **art. 118**.

⁸¹ In this he acts much as does his civil counterpart. See CODE OF CRIMINAL PROCEDURE **art. 177**.

⁸² CODE OF MILITARY JUSTICE **art. 66**.

⁸³ CODE OF MILITARY JUSTICE **art. 258**.

⁸⁴ CODE OF MILITARY JUSTICE **art. 66**.

⁸⁵ See text to note 88, *infra*, for the composition of the **court**.

⁸⁶ CODE OF MILITARY JUSTICE **art. 66**.

⁸⁷ See note 10 *supra* and text accompanying.

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colonel.⁸⁸ The indicting chamber reviews the record prepared by the examining magistrate, decides whether trial for a felony is appropriate or not, and sends the case to a permanent armed forces tribunal for trial.⁸⁹ The court also has power to order the charges dismissed should it decide that any trial would be inappropriate.

2. *The Trial Court.*

Preliminary Procedures. There is, in time of peace, only one military court having trial jurisdiction, the permanent armed forces tribunal. One of these courts is established in each military, air, or maritime region. The court meets at the call of the general commanding the region, and he must summon the court to hear cases that have been transferred for trial by an examining magistrate or indicting chamber.⁹⁰

Misdemeanors may be brought before the armed forces tribunal without the preliminary, judicial investigation. This procedure is known as "direct citation." The general commanding the military region, after consultation with the government commissioner attached to the court, may order that cases in which a preliminary inquiry has been conducted by the defendant's commanding officer be tried without referral to an examining magistrate. However, the accused must be given three days' notice of the time of trial, he must be allowed additional time to prepare a defense if he needs it, and he must be informed of his right to counsel.⁹¹

In the usual case, after the military examining magistrate, or the indicting chamber of the court of appeal, orders an accused brought to trial, the government commissioner must notify both the accused and the general commanding the military region of the action that has been taken.⁹² The general must then order the court into session to try the case.

Trial Procedure. The hearings must be public, except that the court may vote to exclude the public if it decides that the public

⁸⁸ CODE OF MILITARY JUSTICE art. 68. This officer is designated for a one-year term by the commanding general of the region within which the court of appeals is located.

⁸⁹ In the civilian system the indicting chamber, if it decides that a felony is involved, then transfers the case to a felony court rather than to the court of primary jurisdiction, which tries misdemeanors. There is no separate court in the military system for the trial of felonies, so this review of a military case simply fixes the maximum penalty. If the indicting chamber decides that a felony is not involved, a penalty of no more than five years' imprisonment and a fine may be imposed by the armed forces tribunal.

⁹⁰ CODE OF MILITARY JUSTICE art. 9.

⁹¹ CODE OF MILITARY JUSTICE art. 52b.

⁹² CODE OF MILITARY JUSTICE art. 69.

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order or welfare is endangered, and the president may prohibit the attendance of minors. The judgment of the court must always be announced at a public session. Even if the trial is public, however, the court may prohibit any reporting of the proceedings until after the judgment is rendered.⁹³

The president of the court, the civilian member, is responsible for the progress of the trial and has rather broad discretionary powers to ensure the maintenance of order and the discovery of truth.⁹⁴ The trial begins with the reading aloud by the clerk of the court of the order convoking the court, the order transferring the accused for trial, and such parts of the examining magistrate's reports as the president feels are needed to give the court an understanding of the case. The president then reminds the defendant of the offense with which he is charged and advises him that he has a right to say anything that may be useful to his defense.⁹⁵ From that point, the trial proceeds under the same rules as govern felony courts.⁹⁶ The witnesses called by the prosecution and the accused are then heard.⁹⁷ The witnesses are supposed to be kept away from the courtroom until after they have testified.⁹⁸ Before giving his statement, the witness is asked by the president of the court to state his name, age, occupation, domicile, whether he knew the accused before the alleged offense, and whether he is related to or employed by the accused.⁹⁹ Unless a witness is related to the accused or is under sixteen years old he is required to swear that he will speak without hatred or fear and that he will tell nothing but the truth.¹⁰⁰ The witness then makes his statement. He may not be interrupted, except that the president may prevent him from compromising the dignity of the court or from prolonging the trial without contributing to the certainty of its outcome.¹⁰¹ After the witness has finished he may be questioned by the president and the government commissioner. The other judges may, with the president's approval, ask questions, and counsel for the accused may submit questions to be

⁹³ CODE OF MILITARY JUSTICE art. 72.

⁹⁴ CODE OF MILITARY JUSTICE arts. 73, 82.

⁹⁵ CODE OF MILITARY JUSTICE art. 79.

⁹⁶ CODE OF MILITARY JUSTICE art. 85.

⁹⁷ CODE OF CRIMINAL PROCEDURE art. 329.

⁹⁸ CODE OF CRIMINAL PROCEDURE art. 325. But, failure to conform to the mandate of the statute has been repeatedly held by the Court of Cassation not to be a ground for reversal.

⁹⁹ CODE OF CRIMINAL PROCEDURE art. 331.

¹⁰⁰ CODE OF CRIMINAL PROCEDURE art. 335.

¹⁰¹ CODE OF CRIMINAL PROCEDURE arts. 309, 331.

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asked by the president.¹⁰² After testifying, a witness must remain in the courtroom until the court retires to deliberate unless he is excused earlier by the president.¹⁰³ After the last witness is heard, the government commissioner sums up. The accused and his counsel follow with the argument for the defense. The accused and his counsel may both speak if they see fit. If the government commissioner replies to the defense argument, the defense has another opportunity to speak. The defense always has a right to have the last word.¹⁰⁴

After the conclusion of the public hearing, the court retires to deliberate on the questions of guilt, aggravating circumstances, justification, and special defenses.¹⁰⁵ Voting is by secret ballot,¹⁰⁶ and each question posed to the court by the president may be resolved against the accused only by a majority of five of the seven judges.¹⁰⁷ If the accused has been tried for several offenses, the court votes on all the questions for each offense separately. If the court finds the accused guilty of one or more offenses, it proceeds to select a punishment for each offense of which he was convicted. Beginning with the junior member of the court and going up to the president, who voices his opinion last, each member of the court suggests a punishment. If no punishment receives a majority agreement, the least severe punishment suggested is adopted for that offense.¹⁰⁸ If the defendant has been convicted of more than one offense only the most severe of the several punishments arrived at by the court is adjudged against him.¹⁰⁹

3. *Appeal and Review.*

No appeal¹¹⁰ may be taken from the decision of an armed forces tribunal,¹¹¹ but its decision may be attacked by way of petition for review¹¹² before the Court of Cassation.¹¹³

¹⁰² CODE OF CRIMINAL PROCEDURE arts. 312, 331, 332.

¹⁰³ CODE OF CRIMINAL PROCEDURE art. 334.

¹⁰⁴ CODE OF CRIMINAL PROCEDURE art. 346.

¹⁰⁵ *E.g.*, minority.

¹⁰⁶ The court votes first on the question of guilt. If that is decided against the accused, they vote in turn on the existence of aggravating circumstances, justification, and special defenses.

¹⁰⁷ CODE OF MILITARY JUSTICE arts. 89, 90.

¹⁰⁸ CODE OF MILITARY JUSTICE art. 91.

¹⁰⁹ CODE OF MILITARY JUSTICE art. 92.

¹¹⁰ In French law, an appeal brings the whole record before the appellate court and amounts to a hearing *de novo*.

¹¹¹ CODE OF MILITARY JUSTICE art. 99.

¹¹² On review the record is closed, and all that is decided is whether or not the questions of law discussed in the petition for review were correctly decided below.

¹¹³ CODE OF MILITARY JUSTICE art. 100.

D. THE OPERATION OF MILITARY JUSTICE IN TIME OF WAR OR EMERGENCY

A military court system designed to dovetail so closely with the machinery of civilian justice, though desirable in some respects, presents serious problems when it is called upon to operate on a global scale. Moreover, it was felt, in France, that there might be occasions when a less civilianized procedure would be desirable within the country. For these reasons a rather complicated procedural arrangement was worked out for wartime and for national emergencies.

1. *The Permanent Establishment.*

In time of war the permanent armed forces tribunals are continued in existence, but each civilian president is replaced by a military officer of a rank at least equal to that of the highest ranking military judge on the court.¹¹⁴ For the trial of a defendant of one of the five lowest enlisted grades, a judge of the same grade as the defendant is appointed to the court, and the highest ranking military judge presides. The tribunals thus composed have jurisdiction to try military and assimilated personnel for all offenses, no matter where they are committed. For offenses not provided for in the military code, the penalties prescribed by the ordinary penal laws apply.¹¹⁵

Differences in Procedure. Up to the close of the examining magistrate's investigation, prosecution of offenders to be tried before the permanent armed forces tribunals is conducted in the same way in time of war as in time of peace. But, the indicting chamber does not function in military cases in time of war, except to hear appeals from the decisions of examining magistrates. At that point, if the examining magistrate finds that the military courts have jurisdiction and that a triable offense has been committed, he orders the case transferred directly for trial. The procedure at trial is the same as in time of peace.¹¹⁶

Appeal and Review. In time of war, permanent armed forces tribunals of cassation are established to review decisions of the permanent armed forces tribunals.¹¹⁷ No further appeal or review is available.¹¹⁸

¹¹⁴ CODE OF MILITARY JUSTICE arts. 124, 125a.

¹¹⁵ CODE OF MILITARY JUSTICE art. 125b. But, see the exception indicated at note 66.

¹¹⁶ CODE OF MILITARY JUSTICE art. 125b.

¹¹⁷ CODE OF MILITARY JUSTICE art. 125b.

¹¹⁸ CODE OF MILITARY JUSTICE art. 138.

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The permanent armed forces tribunals of cassation are composed of six judges: a president, who must be an acting chamber president from the local court of appeal, three judges from the court of appeal, one colonel or lieutenant colonel, and one other field grade officer.¹¹⁹ The court may set aside a trial court judgment (1) if the trial court was not properly composed, (2) if jurisdictional rules have been violated, (3) if the facts found will not support the penalty adjudged, (4) if legal procedures prescribed on pain of nullity have been omitted, and (5) if a petition, of either the accused or the government commissioner, claiming a privilege or legal right was not acted upon.¹²⁰ Should the court set aside the judgment it must remand the case to another trial court for proper action.¹²¹ Like the Court of Cassation, the permanent armed forces tribunal of cassation may not decide the merits of the case.¹²²

2. *Temporary Courts.*

Field Tribunals. In time of general or partial mobilization, military tribunals may be established at army, corps, division, and isolated detachment headquarters. These tribunals are composed of five judges drawn from military personnel assigned to the organization for which the tribunal is established. The assistance of defense counsel is assured by appointment of reserve officers, officers with noncombatant assignment, or officers who have been injured to serve as special military magistrates. Appointed defense counsel must be qualified lawyers. The defendant still has a right to have counsel of his own choosing if any are available for that service.¹²³

The judges of the military tribunals are appointed by the officer commanding the unit for which the tribunal sits, but he must select them according to grade or rank in **grade**.¹²⁴ If enough officers of the grades required by the code are not available, judges of lower grades may be appointed, but no more than two judges may be of a grade lower than that of the accused. If it is not possible to fill the bench from the personnel available in the unit for which the court sits, the army commander or Minister of National Defense must assign members from other units.¹²⁵

¹¹⁹ CODE OF MILITARY JUSTICE art. 126.

¹²⁰ CODE OF MILITARY JUSTICE art. 124.

¹²¹ CODE OF MILITARY JUSTICE arts. 152, 153.

¹²² CODE OF MILITARY JUSTICE art. 133.

¹²³ CODE OF MILITARY JUSTICE art. 156.

¹²⁴ CODE OF MILITARY JUSTICE art. 157a.

¹²⁵ CODE OF MILITARY JUSTICE art. 157a.

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These military tribunals established in the field have jurisdiction to try any person subject to trial by the permanent armed forces tribunals in time of peace, civilian personnel employed by the army and service organizations, canteen personnel, and anyone else accompanying the troops with permission.¹²⁶ Outside the territory of metropolitan France and in any army in combat, these tribunals have jurisdiction to try any person for the offenses set out in Book Two of the Code.¹²⁷

The jurisdiction of the field tribunals is divided between the units authorized to maintain courts, according to the rank of the accused. Division and detachment tribunals have jurisdiction to try personnel up to and including the grade of **captain**.¹²⁸ Tribunals at corps level have jurisdiction over personnel up to the grade of colonel attached to the headquarters or units not maintaining courts, and over battalion and squadron chiefs and majors, lieutenant colonels, and colonels attached to other subordinate units.¹²⁹ The military tribunal established at the headquarters of an army has jurisdiction to try persons who can be tried at corps if a tribunal has been established at that level, persons attached to army headquarters, persons not within a subordinate organization having authority to maintain tribunals, and general officers. The army commander may arrange to have general officers transferred for trial to the nearest permanent armed forces tribunal, however.¹³⁰

Proceedings before trial by the temporary military courts are conducted like those before trial by the permanent armed forces tribunals in time of **war**,¹³¹ but for the fact that appeals from the examining magistrate's orders are taken to a military tribunal of cassation, which proceeds as would the indicting chamber in other cases, except that the accused is not represented as he may be before the indicting **chamber**.¹³² The procedure for direct citation¹³³ may be used in all but capital cases whether there has been any preliminary inquiry or not. The procedure at trial is governed by the same rules as govern trials before the peacetime courts, except that the defendant is allowed twenty-four hours to prepare

¹²⁶ CODE OF MILITARY JUSTICE art. 163.

¹²⁷ CODE OF MILITARY JUSTICE arts. 163, 165.

¹²⁸ CODE OF MILITARY JUSTICE art. 166.

¹²⁹ CODE OF MILITARY JUSTICE art. 167.

¹³⁰ CODE OF MILITARY JUSTICE art. 168.

¹³¹ CODE OF MILITARY JUSTICE art. 172.

¹³² CODE OF MILITARY JUSTICE art. 177.

¹³³ See p. 132 *supra*.

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his defense and has a right to produce witnesses without any formalities other than notice to the government commissioner before the opening of the trial. Review may be petitioned to a military tribunal of cassation. The defendant's right to have his case reviewed may be suspended except in cases of condemnation to death.¹³⁴

Tribunals for Besieged Areas. If, within France, a part of the area over which one of the permanent armed forces tribunals has jurisdiction should be declared to be in a state of siege a separate military tribunal may be established with jurisdiction limited to the besieged area. Such a court is composed as are the regular permanent armed forces tribunals in time of war, but it has a broader jurisdiction under the laws that govern the state of siege.¹³⁵

Special provision is made for the establishment of military tribunals in any place in a war area or state of siege.¹³⁶ They have the same jurisdiction and procedure as have the military tribunals established at a unit headquarters.¹³⁷ These tribunals are convened by the highest ranking commander in the area and may be manned by officers who are on leave, retired, or in inactive reserves. If the required grades are not available to constitute the military tribunals as at a unit headquarters,¹³⁸ any officers may be appointed, except that the president of the tribunal must be of a rank at least equal to that of the accused. If necessary, the tribunal may consist of three, rather than the usual five, officers.¹³⁹

Appeals and Review. Military tribunals of cassation are established to review cases from the permanent armed forces tribunals having jurisdiction over areas in a state of siege and from the temporary military tribunals.¹⁴⁰ These tribunals consist of **five** officers—a brigadier general as president, two colonels or lieutenant colonels, and two battalion or squadron chiefs or majors. The members are chosen from among the personnel assigned to the area according to the rules for selecting officer members for the permanent armed forces tribunals.¹⁴¹ The bench may be re-

¹³⁴ CODE OF MILITARY JUSTICE art. 179.

¹³⁵ CODE OF MILITARY JUSTICE art. 159.

¹³⁶ CODE OF MILITARY JUSTICE art. 160.

¹³⁷ See text to note 127 *supra*.

¹³⁸ See text to note 124 *supra*.

¹³⁹ CODE OF MILITARY JUSTICE arts. 161, 162.

¹⁴⁰ CODE OF MILITARY JUSTICE arts. 183, 185.

¹⁴¹ CODE OF MILITARY JUSTICE art. 184.

duced to three members in the same way as is prescribed for the trial courts established in places of **war**.¹⁴²

3. *Provostships*.

For army operations in foreign territory, provision has been made for army provosts who have jurisdiction within their division or detachment. They may try anyone for violations and may try canteen personnel, merchants, servants, and all other persons accompanying the army with permission, vagabonds and vagrants, and prisoners of war who are not officers for any breach of disciplinary regulations and any other offense for which penalty may not exceed one year in prison and a fine of **720 new francs**.¹⁴³ They also have jurisdiction over civil claims not exceeding 15 new francs¹⁴⁴ that have grown out of such an offense. There is no appeal from or review of their **decisions**.¹⁴⁵ The provost gains jurisdiction over cases on transfer from other military authorities or upon complaint by an injured **party**.¹⁴⁶

IV. SUMMARY

The unique element of the French military justice system, from the point of view of American military law, is the integration of the permanent military tribunals in France into the structural system of the French civil courts. This is made possible in part by the geographic organization of these permanent tribunals. For this reason units in the field outside of metropolitan France must have a separate system of field tribunals and this latter organization of military courts more closely conforms with the American concept of courts-martial organized on a command or unit basis.

¹⁴² CODE OF MILITARY JUSTICE art. 186. See text to note 140 *supra*.

¹⁴³ About \$150.

¹⁴⁴ About \$3.

¹⁴⁵ CODE OF MILITARY JUSTICE art. 189.

¹⁴⁶ CODE OF MILITARY JUSTICE art. 190.

25 MILITARY LAW REVIEW

By Order of the Secretary of the Army:

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